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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2001

SHAWN LEMAIRE, ET AL
PETITIONERS

VERSUS

DANOS & CUROLE MARINE CONTRACTORS, INC.
RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. May the Court of Appeals, Fifth Circuit, refuse to apply state substantive law under the Outer Continental Shelf Lands Act (O.C.S.L.A.), 43 U.S.C. 1333, where federal statutory law fails to address the factual situation of a negligent third-party subcontractor rendered **immune** from tort and/or compensation liability to an otherwise entitled victim; or, alternatively stated:

2. May the Fifth Circuit ignore the implicit and implied purpose and language of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 904 (a) and 905 (a), by jurisprudentially extending its "borrowed co-employees" doctrine to grant immunity from compensation and tort liability to a negligent subcontractor, who thereby is **never** held accountable for his negligent actions.

LIST OF ALL PARTIES TO THE PROCEEDING

The undersigned counsel of record for plaintiffs-appellants, Shawn Lemaire, individually and as natural tutor of his minor son, Austin Lemaire, and Misty T. Lemaire, certifies that the following listed persons have an interest in the outcome of this proceeding in the United States Court of Appeals, Fifth Circuit, whose judgment is sought to be reviewed.

Shawn Lemaire, individually and as natural tutor of Austin Lemaire, plaintiff-appellant;

Misty T. Lemaire, plaintiff-appellant;

Danos & Curole Marine Contractors, Inc., defendant-appellee;

Charles Phillips, defendant-appellee;

Norriseal, a division of Dover Resources, a subsidiary of Dover Corp., defendant;

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CITATIONS OF THE OFFICIAL AND UNOFFICIAL REPORTS OF THE OPINIONS AND ORDERS ENTERED IN THE CASE BY COURTS

None of the decisions below were reported to the knowledge of applicant herein. A complete listing of the relevant orders, judgments and/or opinions below, and the dates of entry of same, is provided below and incorporated in Appendix A.

No. _____

IN THE

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SHAWN LEMAIRE, ET AL
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DANOS & CUROLE MARINE CONTRACTORS, INC.
RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Shawn Lemaire, individually and as natural tutor of his minor son Austin Lemaire, and Misty T. Lemaire, the petitioner-applicants herein, pray for the issuance of a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above entitled case on July 10, 2001.

OPINIONS AND JUDGMENTS BELOW

The opinion of the United States Court of Appeals for the Fifth Court sought for review was a memorandum opinon not reported which is included in Appendix A of this Petition on pages A-1 through A-27, which affirmed the district court's grant of summary judgment in favor of Danos & Curole Marine Contractors, Inc. and its employee, Charles Phillips. This opinion and ruling was entered on July 10, 2001.

The judgment of the United States District Court for the Western District of Louisiana, unpublished, but printed in Appendix A of this Petition, was incorporated in the Court of Appeals decision referenced above, granted summary judgment for Danos & Curole Marine Contractors, Inc. ("Danos & Curole"), finding that Lemaire's action against Danos & Curole as a third-party defendant for injuries to Lemaire allegedly sustained by the negligence of a Danos & Curole employee was barred under the Longshoremen's and Harbor Workers' Compensation Act ("LHWCA") because the employee and Lemaire were co-borrowed employees of Texaco. This judgment was entered on September 12, 2000.

JURISDICTION

Jurisdiction in the lower court is based upon federal question jurisdiction pursuant to 28 U.S.C. 1331, and pendent jurisdiction under 28 U.S.C. 1367, as the Outer Continental Shelf Lands Act (O.C.S.L.A.), 43 U.S.C. 1331, et seq, incorporating the provisions of the Longshoremen's and Harbor Workers' Compensation Act (L.H.W.C.A.), 33 U.S.C. 902 (3), 902 (4), 904 (a), 905 (a), and 933 (a), (h), and (i), and Louisiana state substantive law are invoked.

Jurisdiction of the United States Supreme Court is invoked pursuant to 28 U.S.C. 2101(C), as well as under 28

U.S.C. 1254. The judgment of the United States Court of Appeals for the Fifth Circuit was entered on July 10, 2001.

STATEMENT OF THE CASE

Plaintiff Lemaire brought the instant suit under the Outer Continental Shelf Lands Act, 43 U.S.C. 1333, against Danos & Curole Marine Contractors, Inc., and its employee, Charles Phillips, and the valve manufacturer, Norriseal, a division of Dover Resources, a subsidiary of Dover Corporation, for damages sustained as a result of an accident occurring on December 14, 1996, located on an unmanned, fixed Texaco production platform known as "West Cameron 643B" (manned temporarily with Lemaire and Phillips). This fixed platform was located beyond the three-mile limit on the Continental Shelf. The court of first instance had federal question jurisdiction pursuant to 28 U.S.C. 1331, and further had pendent jurisdiction over petitioners' state law tort claims pursuant to 28 U.S.C. 1367.

On December 14, 1996, Mr. Lemaire, an employee of Steen Production Service ("Steen"), was assisting Charles Phillips, an employee of Danos & Curole Marine Contractors, Inc. ("Danos & Curole"), in unbolting a Norriseal valve on the Texaco platform when the valve came apart due to unrelieved internal pressure, fracturing Mr. Lemaire's skull and causing severe injuries. Lemaire and Phillips were the only two individuals aboard the platform at the time of the accident.

Although Texaco had sent Phillips and Lemaire to this platform, Texaco was unaware of what problems were occurring on this platform, did not give any instructions to Phillips and Lemaire on the date of the accident, did not actively supervise Phillips and Lemaire, and did not have a corporate representative present on the day Phillips and Lemaire were

attempting to service the valve on the production platform. Plaintiff, Lemaire, had been working on Texaco platforms for less than three months at the time of the accident.

Danos & Curole's employee, Phillips, "bled" down the line, supposedly relieving the pressure on the line and the valve. Phillips started taking the valve apart and had almost disassembled the valve when he became tired and Lemaire, who had been on a different level of the platform, was requested by Phillips to assist in disassembling the valve. When Mr. Lemaire started to help Phillips, Phillips stepped away from the valve, yet failed to warn Lemaire of any dangers from pressure buildup or valve disassembly problems and failed to properly instruct and supervise Lemaire as to safe valve disassembly. As Mr. Lemaire removed the bolts, apparently pressure was on the valve and the valve's top blew off, fracturing Lemaire's skull.

Petitioner sued Danos & Curole and Phillips in Louisiana state court, however the cause was removed to federal court for the Western District of Louisiana, and the federal district court granted a summary judgment holding that Danos & Curole and Phillips were immune from tort liability allegedly because Danos & Curole's employee and Steen Production's employee (Lemaire, petitioner) were "borrowed co-employees" of Texaco, the platform owner. The Fifth Circuit affirmed the lower court's summary judgment, resulting in the instant application for a writ of certiorari to this Honorable Court, as the lower courts have ignored statutory federal law which requires the application of state law in areas not covered by the L.H.W.C.A., thereby creating a broad category of totally immune tortfeasors under O.C.S.L.A.

REASONS FOR GRANTING THE WRIT

I. The United States Court of Appeals for the Fifth Circuit has decided an important question of federal law that has not been, but should be, settled by this Court; which conflicts with decisions of the United States Courts of Appeal, Ninth and Eleventh Circuits and/or:

II. The United States Court of Appeals for the Fifth Circuit has decided the important question of federal law of whether or not the federal courts are bound to apply state substantive law under the Outer Continental Shelf Lands Act in a way that conflicts with a decision by the Louisiana Supreme Court, a state court of last resort; and/or:

III. Under the Outer Continental Shelf Lands Act, the United States Court of Appeals for the Fifth Circuit has so far departed from the accepted course of judicial proceedings, or sanctioned such a departure by the lower court, namely the United States District Court for the Western District of Louisiana, by interposing federal common law to bridge a gap in the Longshoremen's and Harbor Workers' Compensation Act, as to call for an exercise of this Court's supervisory jurisdiction to remedy the injustice thereby created.

ARGUMENT

ISSUES:

1. May the Court of Appeals, Fifth Circuit, refuse to apply state substantive law under the Outer Continental Shelf Lands Act (O.C.S.L.A.), 43 U.S.C. 1333, where federal statutory law fails

to address the factual situation of a negligent third-party subcontractor rendered **immune** from tort and/or compensation liability to an otherwise entitled victim; or, alternatively stated:

2. May the Fifth Circuit ignore the implicit and implied purpose and language of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 904 (a) and 905 (a), by jurisprudentially extending its "borrowed co-employees" doctrine to grant immunity from compensation and tort liability to a negligent sub-contractor, who thereby is **never** held accountable for his negligent actions.

THE ISSUE HEREIN IS WHETHER OR NOT THE COURTS ARE BOUND TO APPLY STATE SUBSTANTIVE LAW UNDER THE OUTER CONTINENTAL SHELF LANDS ACT WHERE THERE IS A GAP UNPROVIDED FOR IN THE STATUTORY ENACTMENT OF THE LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT.

UNDER O.C.S.L.A., THE COURT SHOULD APPLY THE SUBSTANTIVE LAW OF THE STATE OF LOUISIANA TO FILL IN THE GAPS OF THE LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT

The district court erred in not applying the substantive law of the state of Louisiana to fill in the gaps of the Longshoremen's and Harbor Workers' Compensation Act. In the context of the Outer Continental Shelf Lands Act, the plaintiff submits that Louisiana substantive law should govern as "surrogate federal law" (See: Outer Continental Shelf Lands Act (hereinafter referred to as "O.C.S.L.A." or the

"Lands Act"), 43 U.S.C. 1333; *Rodrigue v. Aetna Casualty & Surety Co.,* 395 U.S. 352, 89 S.Ct. 1835, (1969); *Chevron Oil Company v. Huson,* 404 U.S. 97, 92 S.Ct. 349 (1971); and U.S. Senate Committee Report on enactment of O.C.S.L.A.).

The Lands Act makes the Outer Continental Shelf, including fixed structures thereon, an area of exclusive federal jurisdiction, 43 U.S.C. 1333(a)(1). The Act extends the laws of the United States to this area, 43 U.S.C. 1333(a) (1), and provides that the laws of the adjacent State shall also apply 'to the extent that they are applicable and not inconsistent' with applicable federal laws, 43 U.S.C. 1333(a)(2). Under Sec. 1333(a)(2) of the Act, state law becomes federal law federally enforced. *Rodrigue v. Aetna Casualty & Surety Co.,* 395 U.S. 352, at 365, 89 S.Ct. 1835, at 1842 (1969). To the extent that a comprehensive body of federal law is applicable under Sec. 1333(a)(1), state law 'inconsistent' with that law would be inapplicable under Sec. 1333(a)(2).

The full text of Sections 1333(a)(1) and 1333(a)(2) reads:

> (a)(1) The Constitution and laws and civil and political jurisdiction of the United States are extended to the subsoil and seabed of the outer Continental Shelf and to all artificial islands and fixed structures which may be erected thereon for the purpose of exploring for, developing, removing, and transporting resources therefrom, to the same extent as if the outer Continental Shelf were an area of exclusive Federal jurisdiction located within a State: Provided, however, That mineral leases on the outer Continental Shelf shall be maintained or issued only under the provisions of this subchapter.
>
> (2) To the extent that they are applicable and not inconsistent with this subchapter or with other Federal laws and regulations of the Secretary now in effect or hereafter adopted, the civil and criminal

> laws of each adjacent State as of August 7, 1953 are declared to be the law of the United States for that portion of the subsoil and seabed of the outer Continental Shelf, and artificial islands and fixed structures erected thereon, which would be within the area of the State if its boundaries were extended seaward to the outer margin of the outer Continental Shelf, and the President shall determine and publish in the Federal Register such projected lines extending seaward and defining each such area. All of such applicable laws shall be administered and enforced by the appropriate officers and courts of the United States. State taxation laws shall not apply to the outer Continental Shelf.

In *Rodrigue*, supra, this Honorable Court clarified the scope of application of federal law and state law under Sections 1333(a)(1) and 1333(a)(2). By rejecting the view that comprehensive admiralty law remedies apply under Sec. 1333(a)(1), the Court recognized that there exists a substantial 'gap' in federal law. Thus, state law remedies are not 'inconsistent' with applicable federal law. Accordingly, the Court held that, in order to provide a remedy for wrongful death, the 'gap' must be filled with the applicable body of state law under Sec. 1333(a)(2).

The Court of Appeals acknowledged that *Rodrigue* clearly establishes that the remedy for personal injury, as for wrongful death, cannot be derived from admiralty law but must be governed by the law of the adjacent State, Louisiana. But the Court of Appeals held that Louisiana's time limitation on personal injury actions need not be applied with the substantive remedy. It supported this holding by reference to the terms of s 1333(a)(2) that limit the application of state law under the Lands Act. The Louisiana time limitation, the Court of Appeals reasoned, is not 'applicable' of its own force and is 'inconsistent' with the admiralty doctrine of

laches. This Honorable Court stated that: "the Court of Appeals' approach amounts to an inappropriate creation of federal common law." See: *Chevron Oil Company v. Huson*, 404 U.S. 97, 100-101, 92 S.Ct. 349, 352-353 (1971).

The courts below erroneously failed to follow this Honorable Court's mandate in *Huson*, thereby creating federal common law as an alleged remedy. As this Honorable Court clearly stated in *Huson:*

> "...[U]nder the Lands Act, there is not even such limited freedom to create a federal statute of limitations, for Congress specified that a comprehensive body of state law should be adopted by the federal courts in the absence of existing federal law. **Congress specifically rejected national uniformity and specifically provided for the application of state remedies** which demand state, not federal, statutes of limitation. **Thus, Congress made clear provision for filling in the 'gaps' in federal law . . .** (*Chevron Oil Company v. Huson*, 404 U.S. 97, 104 and 105, 92 S.Ct. 349, 354 (1971). See also, *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 487-88, 101 S.Ct. 2870, 2880 (1981), quoting *Huson*, **"'...it did not intend that federal courts fill in those 'gaps' by creating new federal law.'"** (Emphasis supplied).

However, this is exactly what the lower courts have done in the instant matter.

This Honorable Court went on to state in *Huson* that: "insofar as Richards bears on the present case, it supports our holding that federal courts should not create interstitial federal common law when the Congress has directed that a whole body of state law shall apply." *Huson*, at 105, 92 S.Ct., at 354, (quoting *Richards v. United States*, 369 U.S. 1, 82 S.Ct. 585, 7 L.Ed.2d 492 (which held that under the Federal Tort Claims Act a federal court must apply 'the whole law of the

State where the act or omission occurred.' *Id.*, at 11, 82 S.Ct., at 592)).

In sum, the clear congressional intent of 43 U.S.C. 1333(a)(1)&(2) and this Honorable Court's decisions in *Huson* and *Rodrigue* should govern the instant matter. The Lands Act calls for the application of the Longshoremen's and Harbor Workers' Compensation Act for compensation and state law negligence to fill in any statutory gaps. "It was the intent of Congress, expressed in the Senate Committee Report, in the Conference Report, and on the floor of the Senate, that state laws be 'adopted' or 'enacted' as federal law." See *Huson*, at 353, quoting *Rodrigue*, at 1838.

"A primary purpose underlying the absorption of state law as federal law in the Lands Act was to aid injured employees by affording them comprehensive and familiar remedies." *Huson*, 92 S.Ct., at 356, quoting *Rodrigue*, 89 S.Ct., at 1840, 1842. *Rodrigue* stated, "[t]his was done in part because men working on these islands are closely tied to the adjacent State, to which they often commute and on which their families live..." *Rodrigue*, 89 S.Ct. 1835, 1837. "[T]he special relationship between the men working on these artificial islands and the adjacent shore" was recognized and "the bill was amended to treat them 'as if (they) were (in) an area of exclusive Federal jurisdiction located within a State.'" *Id.*, at 1842. Under Sec. 1333(a)(2) of the Act, '(s)tate law bec(omes) federal law federally enforced.'" *Huson*, 92 S.Ct., at 353, quoting *Rodrigue*, 89 S.Ct., at 1842. "The Lands Act makes it clear that federal law, supplemented by state law of the adjacent State, is to be applied to these artificial islands as though they were federal enclaves in an upland State." *Rodrigue*, at 1837.

Pursuant to the Lands Act, state law should determine who is "in the same employ," as contemplated by the

Longshoremen's and Harbor Workers' Compensation Act (L.H.W.C.A.), as there is no statutory definition of "same employ" in L.H.W.C.A. and thus there is a gap in the federal statutory law which should be filled by state law. In the instant matter, *if state law were allowed to supplement and fill the gaps of federal law, there would be no inconsistencies in the federal law because state law would be used as surrogate federal law and hence would be adopted as federal law.*

The Court of Appeals, Fifth Circuit, in *Gaudet v. Exxon Corp.*, 506 F. 2d 351, 5th Cir., 1977 specifically noted that "Louisiana negligence law, pursuant to which plaintiffs sought recovery, is incorporated into federal law by this Act." See also: *Aymond v. Texaco,* 554 F.2d 206 (5th Cir. 1977). Danos & Curole erroneously relies herein upon the case of *Perron vs. Bell Maintenance and Fabricators, Inc.*, 970 F.2d 1409 (5th Cir. 1992) in support of its position. First of all, *Perron* was an erroneous extension of federal law into an area already defined by Louisiana state law, and thus this ruling essentially created federal common law which has spawned numerous incestuous proteges. In *Perron*, the court attempted to fill in the gaps of the statutory law set forth in the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 901 et seq. with alleged federal common law, thereby totally ignoring the mandate of 43 U.S.C. Sec's. 1333 (a)(1) and (a)(2), as well as this Honorable Court's rationale set forth in *Rodrigue*, supra, *Huson*, supra, and *Richards*, supra.

Congress rejected the call for uniformity under the Outer Continental Shelf Lands Act (O.C.S.L.A.), 43 U.S.C. 1333, and specifically provided for state law remedies, where not inconsistent with federal laws. (Emphasis supplied). "Thus, Congress made clear provision for filling in the 'gaps' in federal law; it did not intend that federal courts

fill in those 'gaps' themselves by creating new federal common law." *Huson*, 92 S.Ct., at 354, referencing *Richards*, 82 S.Ct. 585, 592, (stating, "'...[F]ederal courts should not create interstitial federal common law when the Congress has directed that a whole body of state law shall apply.'").

However, contrary to Congressional intent, the U.S. Supreme Court and previous Fifth Circuit decisions, *Perron*, was decided without following applicable Louisiana state law to the obvious "gap" in the federal statutory law. The application of the *Perron* decision in the instant matter clearly leads to absurd results in that it results in the creation of entire categories of **immune** tortfeasors who have not given any quid pro quo in return, violates the clear Congressional mandate that federal courts should not create interstitial federal common law when the Congress has directed that a whole body of state law shall apply (See: *Huson*, at 354.); and it violates public policy and leads to inequitable administration of the applicable tort and compensation laws found in the O.C.S.L.A. and L.H.W.C.A. Even more egregiously, the *Perron* court accomplished all of the above under the declared banner of "uniformity" and "consistency" **extended** the "Borrowing Employer Rule" to include all subcontractors and their employees as "coemployees" within the meaning of the L.H.W.C.A. *Perron vs. Bell Maintenance and Fabricators, Inc.*, 970 F.2d 1409 (5th Cir. 1992). (Emphasis supplied). **This is precisely the opposite of what Congress mandated when it enacted the Lands Act and made the call for application of state law in order to fill the gaps in federal law.** (Emphasis supplied).

The Courts below justified the application of *Perron* in exactly the same way. However *Perron* is not "federal law," rather it is federal common law jurisprudence which interprets federal statutory law and is therefore patently incorrect

and inconsistent with the expressed Congressional intent of O.C.S.L.A. "Federal law," as contemplated by O.C.S.L.A., is federal **statutory law** (*Chevron v. Huson*, 92 S.Ct., at 354; *Richards v. United States*, 82 S.Ct., at 592; *Walter Oil & Gas Corp. v. NS Group, Inc.*, 867 F.Supp. 549 (S.D. Texas 1994), and nowhere in the Longshoremen's and Harbor Workers' Compensation Act does it mandate that different subcontractors' employees should be considered as "in the same employ," and thus "coemployees," immune from liability under the L.H.W.C.A.

The analysis and reasoning of *Perron*, and hence its application in the instant matter, is wrong under applicable federal laws of O.C.S.L.A. and L.H.W.C.A. The decision is a judicial interpretation not envisioned by Congress, nor provided for in either act. The decision is a clear violation of congressional intent because it effectively grants tort immunity to an otherwise third party defendant who is not liable for compensation and, if *Perron* is followed, also immune for third-party tort liability. In addition, it defeats the right of Steen Production Service, Inc. for indemnity and reimbursement for compensation benefits from the negligent third party (Danos & Curole) as envisioned by the L.H.W.C.A.

The clear result of the lower court decisions herein is that the applicable language of 33 U.S.C. 933(i) "*[p]rovided*, that this provision shall not affect the liability of a person other than an officer or employee of the employer" does not mean what it says. Since the Act itself does not define its own applicable terms, state law should apply to fill in the gap. Doing this, unless Charles Phillips is an officer or employee of Steen Production Service, Inc., which he is not, then Phillips and Plaintiff, LeMaire, are not "in the same employ." See 33 U.S.C. Sec's. 933(i) and 933(a).

The L.H.W.C.A., 33 U.S.C. Sec. 933 (i), provides that:

> The right to compensation or benefits under this chapter shall be the exclusive remedy to an employee when he is injured, or to his eligible survivors or legal representatives if he is killed, by the negligence or wrong of any other person or persons in the same employ: *Provided,* That this provision shall not affect the liability of a person other than an officer or employee of the employer.

The obvious intention of 933(i) is to reserve unto injured workers their respective tort remedies under state law as against third-party tortfeasors who have given no quid pro quo for immunity or exclusive remedy status as has the immediate employer who is liable for the injured employee's compensation. This interpretation follows the clear intent of the L.H.W.C.A. In addition, the Ninth and Eleventh Circuits have interpreted this phrase to mean persons in the same employ for Sec. 933 (i) purposes. See: *Calder v. Crall,* 726 F.2d 598 (9th Cir. 1984), cert. denied, 469 U.S. 857, 105 S.Ct. 185, 83 L.Ed.2d 118 (1984); *Traywick v. Juhola,* 922 F.2d 786 (11th Cir. 1991). Thus, the *Perron* decision, as well as the lower court's decisions herein, are clearly at odds with the decisions of the Ninth and Eleventh Circuits. Phillips, and his employer, are not officers or employees of the employer of LeMaire (Steen Production Service, Inc.) and thus, should not be immune from a liability claim by LeMaire, an employee of Steen.

As previously stated, the O.C.S.L.A., 43 U.S.C. 1333 (2)(A) extends the adjacent state law to the subsoil and seabed of the Outer Continental Shelf, and artificial islands and fixed structures erected thereon, which would be within the area of the State if its boundaries were to extend seaward to the outer margin of the Outer Continental Shelf . . . so long as the adjacent state law is not inconsistent with federal law. Notwithstanding the *Perron* decision, LeMaire submits

that there is no applicable federal law pertaining to immunity between a negligent subcontractor and its employee who injures another subcontractor's employee. In fact, the L.H.W.C.A. promulgates the ideas of reimbursement and subrogation due the injured's employer from the third-party tortfeasor. See 33 U.S.C. Sec. 933. This is because the employer pays compensation as a result of a third-party's negligence or fault and is entitled by statute to recovery the previous paid benefits. See 33 U.S.C. Sec's. 933 (a) - (h), (describing third-party liability, reimbursement, assignment, institution of proceedings, and subrogation).

In the instant matter, Steen is liable for compensation under the L.H.W.C.A. and Texaco would be liable for compensation only if Steen refused to pay or could not pay. Under state law, Steen would be subrogated to the rights of the injured as against the third-party tortfeasor (Danos & Curole), and would be entitled to reimbursement for compensation benefits it paid on behalf of LeMaire, a result perfectly in harmony with the above-cited federal statutory provisions.

Public policy and congressional intent dictate that Danos & Curole should be treated as a third-party because it did not pay LeMaire wages, did not supply equipment, safety instructions, or training, did not supervise, could not hire or fire LeMaire and was not responsible in any way for the payment of compensation benefits. For economic, societal, and moral considerations, and under the statutory intent of Congress, Danos & Curole is a third-party with respect to LeMaire. To follow the *Perron* decision would defeat Steen's claims for reimbursement against Danos & Curole under the L.H.W.C.A., as well as defeating the clear congressional intent expressed in the Act. The practical effect is that Danos and its employee, Phillips, become **immune** despite their negligence.

Under Louisiana law as surrogate federal law, Danos would be treated as a third-party, a result not in any way in conflict with the intention or mandates of O.C.S.L.A. The Louisiana Supreme Court has thoroughly considered this exact issue and has held that a subcontractor not responsible for compensation and whose actions (by respondeat superior) injure another subcontractor's employee is responsible in tort as a third party. See *Johnson v. Alexander,* 419 So.2d 451 (La. 1982). Similarly, the Court of Appeals, Fifth Circuit, has previously decided that negligence under the Longshoremen's and Harbor Workers' Compensation Act is to be determined by analogy to land-based law concepts. See: *Weiland v. Pyramid Ventures Group,* 511 F.Supp. 1034, 1040 (M.D. La. 1981), quoting *Gay v. Ocean Transport & Trading, Ltd.,* 546 F.2d 1233 (5th Cir. 1977).

In a similar Texas case where state substantive law was applied as surrogate federal law, the court held that the contractor was not entitled to invoke state law workers' compensation immunity in a suit by an injured employee of a subcontractor who was hired to work on a fixed platform located on the outer continental shelf of the Louisiana coast, even though the injured worker was receiving benefits under the LHWCA through the Lands Act (OCSLA) and the injured worker's claim under OCSLA was a claim under surrogate federal law. See: *Torch Operating Co. v. Bartell*, 865 S.W.2d 552, (Tex. App.-Corpus Christi 1993), rehearing overruled, writ denied. As in the instant matter, this result is not in any way inconsistent with the mandates of O.S.C.L.A.

In conclusion, congressional intent and the cases of *Huson* and *Rodrigue* should govern the fact situation in the instant matter. The Lands Act calls for application of the Longshore and Harbor Workers' Compensation Act and the law of the State of Louisiana to fill in any gaps in the statuto-

ry federal law. Thus, this court should grant petitioners' writ of certiorari, apply the law of Louisiana as set forth in Johnson, supra, as surrogate federal law, decline to follow *Perron,* and reverse the district court's and Fifth Circuit's decisions.

THE POLICY AND CLEAR LANGUAGE OF THE LHWCA DOES NOT LEND ITSELF TO THE APPLICATION OF THE BORROWED EMPLOYEES CONCEPT TO PARTIES BEYOND THE BORROWING EMPLOYER

The concept of the Longshoremen's and Harbor Worker's Compensation Act ("LHWC") is based on a quid pro quo: the employer provides compensation, even when it is without fault, but in exchange for that certainty of benefits, the employee gives up his right to maintain against his employer a negligence action for his injuries. 33 U.S.C. 904 and 905 (a). Actions against co-employees of the injured employee are also given up. 33 U.S.C. 933 (i). However, the LHWCA does preserve the employee's right to maintain negligence actions against third-party tortfeasors who are not responsible for compensation benefits to the injured employee.

Furthermore, to prevent confusion in those industries where contractors employ subcontractors to supply certain services, §904 (a) of the LHWCA expressly provides that where the employer of the injured employee is the subcontractor, the general contractor is **only** liable for providing the compensation when the subcontractor fails to provide it. (emphasis added). In addition, §905 (a) provides that for purposes of immunity, the general contractor is deemed the employer of the subcontractor's employee only if the subcontractor fails to secure the compensation under §904 (a). Such is not the case in the instant matter.

Danos & Curole, the employer of an allegedly negligent employee (Charles Phillips), had no responsibility to Lemaire for statutory compensation benefits. There is no quid pro quo between Lemaire and Danos & Curole, just as there is no power to control, hire or fire or any other employer-employee consideration, and thus Danos & Curole should not be immune from tort liability to LeMaire which clearly arose from their negligence.

APPLICATION OF "BORROWED SERVANT DOCTRINE"

To circumvent tort liability, general contractors such as Texaco contend that they are borrowing employers and thus should receive the same immunity as the employer subcontractor of the claiming employee. These were the circumstances in the related case of *Perron vs. Gulf Oil Corp.*, 893 F. 2d 344 (5th Cir. 1989), cert. denied, _____ U.S. _____, 110 S. Ct. 3273, 111 L. Ed. 2d 782 (1990), where the Fifth Circuit held that Gulf, as the borrowing employer of Perron, was immune from tort liability.

While the "borrowed servant doctrine" has been in existence since 1909, it was not applied to LHWCA cases until 1969. See: *Ruiz v. Shell Oil Company*, 413 F. 2d 310 (5th Cir. 1969); *Standard Oil Co. vs. Anderson*, 212 U.S. 215, 29 S. Ct. 252, 53 L. Ed. 480 (1909). Although the doctrine was applied in *Ruiz*, the Fifth Circuit held that the requirements for a borrowed servant relationship were not present in the *Ruiz* case.

Conceivably, a quid pro quo relationship exists between the borrowing employer (Texaco) and the borrowed employee (Lemaire). Texaco ultimately pays for the services of Lemaire through invoices submitted by Steen Production Service and Lemaire receives wages from his employer for

performing Texaco's work. Although Texaco did not provide Lemaire's L.H.W.C.A. compensation, Steen Production Service's costs for obtaining insurance is passed on to Texaco. However, as noted above, there is no such quid pro quo as to Danos & Curole or Phillips, and thus no rationale supports the jurisprudentially granted immunity resulting from the decisions of the lower courts herein. Lemaire and Phillips work for different subcontractors and though they may be "borrowed employees" as to Texaco, neither is a borrowed employee of the other's employer.

Congress in §933 (a) of Title 33 stated:

"If on account of a disability or death for which compensation is payable under this chapter the person entitled to such compensation determines that some person other than the employer or a person or persons in his employ is liable in damages, he need not elect whether to receive such compensation or to recover damages against such third person." Applying §933 (a) to the instant case, Lemaire should be entitled to recover compensation from his employer, Steen Production Service, as well as damages from Danos & Curole for the negligence of Phillips and Danos & Curole.

In addition, §933 (h) of Title 33 provides that:

"Where the employer is insured and the insurance carrier has assumed the payment of the compensation, the insurance carrier shall be subrogated to all rights of the employer under this section." The obvious intent of this provision was to allow the insurance carrier to step into the shoes of the injured employee's employer and recover any amount it has paid in compensation from the wrongdoer. By assuming the payment of compensation to Lemaire, Steen Production Service's insurance carrier should subrogated to the rights of Lemaire against the wrongdoers, Danos & Curole and its

employee Charles Phillips. However, the clear result of the Fifth Circuit's erroneous application of the borrowed and fellow-servant doctrines results in the abrogation of this right in clear contravention of Congressional intent as represented by 33 U.S.C.

Congress further stated in 33 U.S.C. 933 (i) that:

"The right to compensation or benefits under this chapter shall be the exclusive remedy to an employee when he is injured, . . . by the negligence . . . of any other person...in the same employ: *Provided,* That this provision shall not affect the liability of a person other than an . . . employee of the employer."

The L.H.W.C.A. does not define "persons in the same employ." A close reading of this language in connection with 33 U.S.C. 933 (a), (h), and (i), as well as 904 (a) and 905 (a), would indicate that it refers to persons who work for the same employer. Moreover, since the immediate employer is liable for the injured employee's compensation, Congress must have meant a person employed by the employer that provides their compensation. This interpretation follows the clear intent of the L.H.W.C.A. In addition, the Ninth and Eleventh Circuits have interpreted this phrase to mean persons who work for the same employer are persons in the same employ for §933 (i) purpose. *Calder v. Crall,* 726 F. 2d 598 (9th Cir. 1984), *cert. denied,* 469 U.S. 857, 105 S. Ct. 185, 83 L. Ed. 2d 118 (1984); *Traywick v. Juhola,* 922 F. 2d 786 (llth Cir. 1991).

Under the Fifth Circuit's analysis, which is in conflict with that of the Eighth and Eleventh Circuits cited above, any person who would otherwise be a third-party and subject to tort liability is considered a fellow servant and thereby immune from tort responsibility. For example, assume an

employee of an independent inspection company comes to the platform for an inspection; if found to be the borrowed employee of Texaco, this inspector will be a fellow servant of Lemaire and all other borrowed employees of Texaco. This was never the intent of Congress. Under the rationale put forth by the courts below in the instant matter, third parties cease to exist in cases where a general contractor and two subcontractors are involved. Application of the borrowed servant status and fellow servant doctrine was never meant to extend to denying tort recovery against a party who cannot be otherwise ultimately responsible for compensation benefits to the injured worker. Danos & Curole was not and will never be responsible to Lemaire for LHWCA benefits.

An analagous analysis of the Longshoremen's and Harbor Workers' Compensation Act was made by Judge Brown writing for the Fifth Circuit panel in the case of *Probst vs. Southern Stevedoring Company,* 379 F. 2d 763 (5th Cir. 1967). Although the *Probst* decision was before certain amendments to the LHWCA, the method of statutory construction is pertinent and applicable to the instant matter. In *Probst,* the general contractor was sued by Probst, an injured employee of the subcontractor (Atlantic & Gulf Stevedores, Inc.). The district court held "the general contractor, a third person, had the employer's immunity and was therefore not a third person subject to being sued." The Fifth Circuit Court of Appeals disagreed and reversed the lower court's summary judgment, analyzing the relevant part of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 901, et seq., stating:

"Starting, and for that matter ending, with the statute as we must, there is no doubt at all about the right of the injured employee to bring the suit. The Act expressly accords this right and prescribes elaborate machinery for settlement,

apportionment of recovery, and the like. This right against the third-party is extended to the employer or a self-insurer or to his insurance carrier if insured."

See also: *West v. Kerr-McGee,* 765 F. 2d 526 (5th Cir. 1985). Clearly, under the present intent of Congress as set forth in the LHWCA, there is no policy or statute that establishes and extends a secondary protective policy to the subcontractor who is not the employer of the injured employee and who is not liable for compensation.

It should also be noted that this Honorable Court held in *Washington Metropolitan Area Transit Authority v. Johnson,* 467 U. S. 925, 104 S. Ct. 2827, 81 L. Ed. 768, (1984) that the general contractor was immune from liability where it was potentially liable for compensation benefits. In response, Congress amended Sections 904(a) and 905(a) of the L.H.W.C.A. to provide that the general contractor is only liable for providing compensation benefits where the subcontractor fails to so provide. Accordingly, it can be easily seen that this is the criteria which should be utilized by the courts in the instant matter for determining employer-empoyee status.

This clear construction is consistent with the definition of "employer" provided in 902(4). In all cases, the employer of an employee is determined by the 902(4) definition; however, in the case of a subcontractor and a general contractor, 904 (a) and 905 (a) provide one exception to the general rule—that the general contractor shall be employer *only* if the subcontractor fails to fulfill its statutory duty of providing compensation. Since the "borrowed servant doctrine" (a judicial doctrine) is not in the L.H.W.C.A. and has not been retained in the L.H.W.C.A. amendments of 1984, this doctrine should not be judicially extended to §933(i).

CONCLUSION

The Fifth Circuit Court of Appeals should not have filled in the existing statutory gaps of Section 933 (i) of the Longshoremen's and Harbor Workers' Compensation Act by applying "federal common law" in lieu of applicable state law thereby judicially extending immunity to an employee of a subcontractor who allegedly negligently injured the employee of another subcontractor. Where the Outer Continental Shelf Lands Act specifically provides deference to state substantive law to fill in the gaps and Louisiana state law provides an adequate remedy, the Fifth Circuit should have applied Louisiana law.

Not only has the Fifth Circuit misconstrued the plain language of the act, it has neglected to consider the underlying result and consequences of its decision. Lemaire can never recover his damages in tort against an otherwise liable third-party. Further, the otherwise liable third-party never owes compensation to the victim. The insurance carrier for the employer picks up the whole tab for the negligent subcontractor's wrongful actions and is not allowed to seek reimbursement. Furthermore, the decision of the Fifth Circuit herein is in conflict with decisions on the same subject by the Ninth and Eleventh Circuits.

Accordingly, petitioner requests this Honorable Court to grant a writ of certiorari in order to determine to what extent state substantive law should fill in the gaps of the L.H.W.C.A. as incorporated in the Outer Continental Shelf Lands Act, and to further correct an absurd result caused by the Fifth Circuit Court of Appeals' erroneous adoption of "federal common law."

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted:

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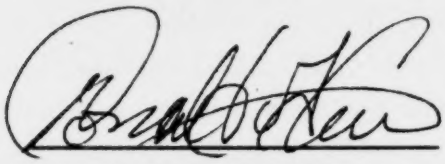


Donald G. Cave, #4073
Michael L. Cave, #26002

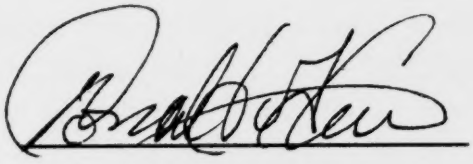
CERTIFICATE

I hereby certify that copies of the above and foregoing application for writs of certiorari have this date been forwarded to the below-listed interested parties, or their counsel of record, at the addresses listed herein:

Mr. Raymond M. Allen
Attorney for Danos & Curole
and Charles Phillips
P. O. Drawer 3204
Lafayette, LA 70502

Mr. Christopher J. Aubert
Attorney for Norriseal, Inc.
506 E. Rutland St.
Covington, LA 70433

Baton Rouge, Louisiana this ____ day of October, 2001.



Donald G. Cave
Attorney for Plaintiff-Applicants

APPENDIX

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF LOUISIANA

LAFAYETTE/OPELOUSAS DIVISION

	FILED
	SEPT. 13, 2000
SHAWN LEMAIRE, ET AL	CIVIL ACTION
	NUMBER 98 CV 0051
VERSUS	JUDGE DOHERTY
	MAGISTRATE METHVIN
DANOS & CUROLE MARINE CONTRACTORS, INC. ET AL	

JUDGMENT

This action came before the Court for hearing on the Motion for Summary Judgment filed on behalf of defendants, Danos & Curole Marine Contractors, Inc. and Charles Phillips, Honorable Rebecca F. Doherty, District Judge, presiding. The issues having been tried and a decision having been duly rendered as set forth in the Court's Memorandum Ruling and Order dated January 22, 1999:

IT IS ORDERED, ADJUDGED, DECREED that the Motion for Summary Judgment filed on behalf of defendants, Danos & Curole Marine Contractors, Inc. and Charles Phillips, dismissing plaintiff Shawn's Lemaire's complaints against Danos & Curole Marine Contractors, Inc. and Charles Phillips is hereby GRANTED as a final judgment.

JUDGMENT RENDERED on the 22nd day of January, 1999, and

READ AND SIGNED on the 12th day of September, 2000, at Lafayette, Louisiana.

REBECCA F. DOHERTY
UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 00-31153
SUMMARY CALENDAR

SHAWN LEMAIRE, Individually and as tutor on behalf of Lemaire; MISTY T. LEMAIRE

Plaintiffs-Appellants

v.

DANOS & CUROLE MARINE CONTRACTORS, INC; ET AL

Defendants

DANOS & CUROLE MARINE CONTRACTORS, INC.; CHARLES PHILLIPS

Defendants-Appellees.

On Appeal from the United States District Court

for the Western District of Louisiana

(98-CV-51)

Before REYNALDO G. GARZA, DAVIS, and DENNIS, Circuit Judges.

PER CURIAM: [1]

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[1] Pursuant to 5th Cir. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

This dispute arises out of an accident that occurred on a production platform owned by Texaco, Inc. ("Texaco") off the coast of Louisiana.[2] Shawn Lemaire was disassembling a valve when the top of the valve blew off and struck Lemaire in the head. Lemaire asserts he suffered a skull fracture, two lacerations, a severed nerve, severe headaches, dizziness, and nerve problems. Lemaire brought suit against another man who was working on the platform, Charles Phillips, & Phillips's employer Danos & Curole Marine Contractors under the Outer Continental Shelf Lands Act, 43 U.S.C. 1331, et seq. Phillips moved for summary judgment on the ground that he and Lemaire are co-employees, and, therefore, he is immune from suit by a co-employee under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 901, et seq. Danos & Curole Marine Contractors moved for summary judgment on the ground that both Phillips and Lemaire were Texaco's borrowed employees, and, therefore, any negligence on the part of Phillips cannot be imputed to Danos & Curole Marine Contractors.

The district court granted the defendants' motions for summary judgment. Having read and considered the record and arguments of counsel, we AFFIRM the decision of the district court based on its memorandum opinion which is attached hereto as Appendix A.

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[2] It is undisputed that the accident occurred more than three miles off the coast of Louisiana on the outer-continental shelf.

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF LOUISIANA

LAFAYETTE/OPELOUSAS DIVISION

SHAWN LEMAIRE, ET AL	CIVIL ACTION NUMBER: 98-0051
VERSUS	JUDGE DOHERTY
DANOS & CUROLE MARINE	MAGISTRATE METHVIN

MEMORANDUM RULING

Before this Court is a Motion for Summary Judgment [doc. #37] filed on behalf of defendants, Danos & Curole Marine Contractors, Inc. ("D&C") and Charles Phillips ("Phillips"). Defendants' Motion for Summary Judgment is based upon their contention there is no genuine issue of material fact as to whether Shawn LeMaire ("LeMaire") and Phillips are the borrowed employees of Texaco, Inc. ("Texaco") and therefore, co-employees as defined by the Longshoremen's & Harbor Workers' Compensation Act, 33 U.S.C. 901, et seq. ("LHWCA").

In summary, defendants, D&C and Phillips, assert that, as a matter of law, LeMaire and Phillips are the borrowed employees of Texaco and that LeMaire is barred from any recovery against his co-employee, Phillips. Defendants further assert plaintiff's claims against defendants, D&C and Phillips, pursuant to the Outer Continental Shelf Lands Act, 43 U.S.C. 1331, et seq. ("OCSLA") and the LHWCA should be dismissed on the basis that LeMaire and Phillips are borrowed employees of Texaco and thus, co-employees under the LHWCA. Pursuant to the LHWCA, Phillips and

Phillips' nominal employer, D&C, would be immune from tort liability as any negligence on Phillips' part would be imputed to Texaco as Phillips' borrowing employer, and not to D&C, Phillips' nominal employer.

In opposing this motion, plaintiff asserts those sections of the LHWCA granting immunity from tort liability to co-employees should not apply. Rather, the OCSLA, 43 U.S.C. 1333, requires that state law be applied regarding third party negligence or immunity and damages. Plaintiff also asserts there are genuine issues of material fact as to whether LeMaire and Phillips were "borrowed employees" of Texaco. Plaintiff further asserts genuine issues of material fact exist as to whether LeMaire was a "co-employee" of D&C employee, Phillips, within the meaning of the LHWCA, 33 U.S.C. 901, et seq.

To rule on defendants' motion, the Court must determine whether LeMaire and/or Phillips were the borrowed employees of Texaco as a matter of law, and thus, co-employees of Texaco as defined by the LHWCA.

Background

On or about December 14, 1996, Shawn LeMaire, plaintiff, was employed by Steen Production Services, Inc. ("Steen") as a C Operator. Plaintiff was working at a job site owned by Texaco, Inc. ("Texaco") in the Gulf of Mexico on a fixed platform located at West Cameron Block 643-B. LeMarie dep. Pgs. 37, 74. It is undisputed that the platform is located more than three miles off the coast of Louisiana on the outer continental shelf.

Prior to his alleged accident, LeMaire had worked continuously in the Texaco 643 field for approximately three months. LeMaire dep. p. 37. On the day plaintiff was

allegedly injured, LeMaire was assisting defendant Charles Phillips ("Phillips"). Phillips was an employee of defendant, Danos & Curole Marine Contractors, Inc. ("D&C"). Phillips usually worked the opposite shift of LeMaire. However, on this particular shift, Phillips stayed on the platform for additional days because another person was off. LeMaire depo. p. 94; Ardoin & Flice depo., pps. 28-30. Prior to LeMaire's alleged accident, Phillips had worked continuously in the Texaco 643 field for one year. Phillips dep. pgs. 10, 41; Solar, a representative of Steen, dep. p. 35.

On the day of the alleged accident, Phillips was removing the last bolt from a Series 357 Control Valve when he became tired. Plaintiff began to help Phillips remove the bolt when the valve blew off and struck plaintiff in the head and knocked him backwards on to the grating causing him to injure his head, neck and back. Plaintiff asserts that as a direct result of this accident, he sustained injuries including a skull fracture, two lacerations requiring stitches, a severed nerve, severe headaches, dizziness and nervous problems.

It is undisputed that at the time of LeMaire's alleged accident, both D&C and Steen were under contract with Texaco to provide employees to operate Texaco platforms offshore and work as directed by Texaco employees. LeMaire dep. p. 37; Solar dep. p. 12. While on the Texaco project, LeMaire and Phillips normally worked schedules of seven days on and seven days off. Phillips dep. p. 37; LeMaire dep. p. 38. Texaco provided their sleeping quarters, their meals and their transportation to and from the job. Phillips dep. p. 36; LeMaire dep. pgs. 44-45, 55-56, 64. Phillips' immediate supervisor was Texaco Lead Operator, Kenneth Domingue. Phillips dep. pgs. 39-40. However, because Phillips had agreed to work over his seven day shift on the date of the accident, he and LeMaire were both super-

vised by Texaco Lead Operator, Richard Remo Ardoin. Id.; Ardoin & Flice dep. pgs. 24, 67-69.

Texaco employees gave LeMaire and Phillips instructions regarding where to work and what to do. Phillips dep. p. 41; LeMaire dep. p. 73; Ardoin & Flice dep. pgs. 55-56. Both LeMaire and Phillips performed the work of Texaco and the evidence provided this Court established the two men consented to the work situation. Solar dep. p. 34; Ardoin & Flice dep. p. 59. Texaco supervisors provided direct orders to and had control over LeMaire and Phillips concerning their work duties. Phillips dep. p. 39; LeMaire dep. p. 73; Ardoin & Flice dep. p. 55. No D&C or Steen supervisors were sent out to any of the Texaco jobs. Phillips dep. 39.

LeMaire and Phillips performed Texaco's work. Ardoin & Flice dep. pgs. 56, 62, 69. Texaco could not terminate LeMaire or Phillips' employment with their nominal employers; however, if Texaco was not satisfied with the work that Phillips or LeMaire was doing, a Texaco supervisor could have either man discharged from his position on the Texaco platform by simply calling the offices of their "nominal" employers and mentioning that their services were no longer needed. Phillips dep. p. 42; LeMaire dep. p. 65; Ardoin & Flice dep. pgs. 59-62.

Law and Discussion

Pursuant to the OCSLA, 43 U.S.C. 1331, et seq., the LHWCA, 33 U.S.C. 901, et seq., is the law applicable to provide an injured offshore worker compensation benefits. As the LHWCA applies, it preempts "the application of the idiosyncrasies of the Louisiana Workers' Compensation scheme." *Perron v. Bell Maintenance and Fabricators, Inc.*, 970 F. 2d 1409, 1411 (5th Cir. 1992). However, outside of the Workers' Compensation arena, the OCSLA makes the

tort law of the adjacent state surrogate federal law and thus applicable to any tort-based cause of action for those offshore injuries. *See* 43 U.S.C. 1381, et seq. In other words, were the plaintiff to have a remedy in tort against a non-employer and thus, outside the LHWCA, this Court would apply the substantive tort law of Louisiana. However, should this plaintiff not have a tort remedy available against defendants D&C and Phillips, LeMaire would be limited to LHWCA benefits as the LHWCA is the workers' compensation scheme applicable to an offshore worker, such as the plaintiff, who sustains a work related injury on the Outer Continental Shelf.

D&C and Phillips argue LeMaire and Phillips are both borrowed employees of Texaco and thus, LeMaire cannot sue his co-employee. "The question of borrowed-employee status is a question of law for the district court to determine." *Billizon v. Conoco, Inc.*, 993 F. 2d 104, 105 (5th Cir.), *reh'g denied*, 3 F.3d 441 (1993). However, "in some cases, factual disputes must be resolved before the district court can make its legal determination." *Id.* The Fifth Circuit has set out the following nine (9) factors which must be considered in determining borrowed employee status:

1. Who had control over the employee and the work he was performing, beyond mere suggestion of details or cooperation?

2. Whose work was being performed?

3. Was there an agreement, understanding, or meeting of the minds between the original and the borrowing employer?

4. Did the employee acquiesce in the new work situation?

5. Did the original employer terminate his relationship with the employee?

6. Who furnished tools and place for performance?

7. Was the new employment over a considerable length of time?

8. Who had the right to discharge the employee?

9. Who had the obligation to pay the employee?

Id. (citing *Brown v. Union Oil Co. of California,* 984 F. 2d 674, 676 (5th Cir. 1993). The Fifth Circuit "has held many times that no single factor is determinative." *Id.* At 106.[1]

In addition to considering the above factors, this Court reviews defendant's Motion for Summary Judgment under the standard set out in Rule 56 of the Federal Rules of Civil Procedure. Rule 56 provides that summary judgment shall be rendered when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. No genuine issue of fact exists if the record, taken as a whole, could not lead a rational trier of fact to find for the non-moving party. *Matsushita Electric Industrial Co. v. Zenith Radio Corp.,* 475 U. S. 242, 257 (1986). The plaintiff must present affirmative evidence in order to defeat a properly supported motion for summary judgment. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 257 (1986). Plaintiff must make a showing sufficient to establish the existence of an element essential to his case, and on which he will bear the

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[1] However, the court has also stated the first factor is the "central issue" of borrowed employee status, *Melancon v. Amoco Production Co.,* 834 F. 2d 1238, 1245 (5th Cir.) *amended,* 841 F. 2d 572 (1988). In other cases, the Fifth Circuit has stressed the importance of the fourth, fifth, sixth, and seventh factors of borrowed employee status. *See Id.*, n. 12.

burden of proof at trial. *Fields v. Hallsville Independent School District,* 906 F. 2d 1017, 5th Cir., 1990 (citing *Celotex v. Catrett,* 477 U. S. 317, 322-323 (1986). In *Anderson,* the Supreme Court held that the "inquiry involved in a ruling on a motion for summary judgment . . . necessarily implicates the substantive evidentiary standard of proof that would apply to trial on the merits." The judge must decide:

> [W]hether a fair-minded jury could return a verdict for the plaintiff on the evidence presented. The mere existence of a scintilla of evidence in support of a plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff. The judge's inquiry, therefore, unavoidably asks whether reasonable jurors could find by a preponderance of the evidence that the plaintiff is entitled to a verdict...

Anderson, 477 U.S. at 252.

A. Was Plaintiff the Borrowed Employee of Texaco?

1. Who had control over plaintiff and the work he was performing, beyond mere suggestion of details or cooperation?

Regardless of the presence or absence of Texaco employees on the Texaco platform 643-B at the actual time of the alleged accident, the evidence provided the Court is undisputed LeMaire was instructed by Texaco's employees. Of the four or five months of his employment with Steen, LeMaire spent the three months prior to his alleged accident reporting directly to Texaco's platform. During his work for Texaco, LeMaire filled out a daily log of his work hours in order to be paid for the job he was performing for Texaco. LeMaire dep. p. 70. The only contact LeMaire had with Steen was to report his hours and receive his paycheck.

Accordingly, this Court finds that as to factor one (1), Texaco had control over LeMaire and the work he was performing.

2. Whose work was being performed?

Plaintiff controverts defendants' 'statement that "[b]oth LeMaire and Phillips were doing work only for Texaco while on the Texaco jobs," on the grounds that both LeMaire and Phillips were doing work for their respective employers, Steen and D&C, which involved work for Texaco under contract. However, plaintiff's assertion embodies the nature of the "borrowed employee." The evidence provided this Court establishes no question exists that the work performed by LeMaire and Phillips was Texaco's work. LeMaire dep. p. 73; Ardoin & Flice dep. pgs. 56, 62, 69. Accordingly, this Court finds that LeMaire was performing Texaco's work.

3. Was there an agreement, understanding, or meeting of the minds between the original and borrowing employer?

Plaintiff asserts in his Statement of Material Facts, page 3, that the contract between Texaco and Steen provided that Steen was an independent contractor and that its employees were not subject to Texaco's control. However, a contract provision such as the one described above does not bar a borrowed employee's status. *Brown*, 984 F. 2d at 677; *Melancon*, 834 F. 2d at 1245. The parties' actions in carrying out the contract can provide an implied modification or waiver of such an express provision. *Id.* As defendants assert, no written agreement is even required. *Billizon*, 993 F. 2d at 105-106.

In *Billizon*, the only disputed issue before the Court was whether the existence of a contract provision "purporting to prohibit borrowed-employee status [made] the district court's summary judgment inappropriate." 993 F. 2d at 106. The

Court held that even assuming factor three weighed in favor of the plaintiff's position, the remainder of the summary judgment record established that the plaintiff was Conoco's borrowed employee. *Id.*

In that case, the service contract governing the relationship between Conoco and the plaintiff's nominal employer, D&C, provided that the employees of D&C were not the employees of Conoco. However, the Court stated that it is "the reality of the work site and the [parties'] actions" in carrying out a contract that established for the Court that the two employers had the contrary "understanding or meeting of the minds." *Id.*

Despite the contrary provisions in the contract between Steen and Texaco, the facts and testimony provided this Court indicate that Texaco controlled the work performed by LeMaire. Donald Solar, a representative of Steen, LeMaire's direct employer, stated in his deposition that, "We had a contract with Texaco to furnish personnel, but the detail job description that was Texaco." Solar dep. p. 34. Solar also testified that Texaco had exclusive day to day supervision over LeMaire when he was on the Texaco job. Solar dep. p. 36.

In this case, like *Billizon,* only the third factor could possibly support plaintiff's contention that he was not a borrowed employee of Texaco. However, the Fifth Circuit has repeatedly stated that "no single factor is determinative." *Billizon,* 993 F.2d at 106; *Brown*, 984 F.2d at 676; *Melancon,* 834 F.2d at 1245. Therefore, the Court must further examine the remaining factors to determine LeMaire's status as Texaco's borrowed employee.

4. Did the employee acquiesce in the new work situation?

The Court in *Capps v. N.L. Bariod-NL Industries, Inc.*, 784 F.2d 615, 617 (5th Cir.) *cert denied,* 479 U.S. 838, 107 S. Ct. 141 (1986) states:

> The fourth factor asks whether the employee acquiesced in the new work situation. Since Capps worked for a company that loaned temporary employees, Capps knew Davis would send him into new work situations. Thus, going into new work situations was Capps' work situation. When he went to work for Davis, he acquiesced to the fact that Davis would constantly send him into new work situations.

The facts of this case and the deposition testimony provided the Court establish that LeMaire acquiesced in the work situation. LeMaire worked for three months for Texaco under the conditions previously mentioned which included eating and sleeping on Texaco's fixed platform. The Fifth Circuit has stated that working for "one month is a sufficient amount of time for [the employee] to appreciate the new work condition." *Brown,* 984 F.2d at 678.

In Solar's deposition, he stated, as Steen's representative, that LeMaire never protested to Solar regarding LeMaire's work situation with Texaco through Steen. Solar dep. p. 34. Further, Richard Ardoin, LeMaire's and Phillips' supervisor and Texaco's Lead Operator on the date of plaintiff's alleged accident, stated in his deposition that he never heard LeMaire protest doing Texaco's work when LeMaire was sent out to Texaco's platform Ardoin & Flice dep. p. 59.

Accordingly, the Court finds pursuant to factor four (4) that LeMaire did acquiesce in his working situation as an employee of Steen and the borrowed employee of Texaco.

5. Did the original employer terminate his relationship with the employee?

Under this factor, the Fifth Circuit has stated:

> We do not believe that this factor requires a lending employer to completely sever his relationship with the employee. Such a requirement would effectively eliminate the borrowed employee doctrine as there could never be two employers. The emphasis when considering this factor should focus on the lending employer's relationship with the employee while the borrowing occurs.

Capps, 784 F.2d at 617-618. As previously stated, during his employment with Steen, LeMaire worked under Texaco's supervision and control.

LeMaire stated in his deposition that the only supervision on Texaco's platform was provided by either Texaco employees or higher contract employees who were also working for Texaco. LeMaire dep. p. 73. LeMaire's contact with Steen was limited to reporting his hours to Steen. LeMaire had a copy of his time sheet delivered to Steen so he could receive his paycheck for the work he performed for Texaco. LeMaire dep. p. 70; Ardoin & Flice dep. p. 62; Solar dep. p. 36. Ardoin stated in his deposition that when the contract workers were on Texaco's platform, Texaco had control over those workers. Ardoin & Flice dep. p. 55. Ardoin also stated that even if he, or another Texaco employee, was not actually on the Texaco platform in the presence of the contract employees, Ardoin was still in charge of those employees. Ardoin & Flice dep. p. 32. Robert Flice, a representative of Texaco, stated in his deposition that Texaco could send contract employees, like LeMaire and Phillips, wherever Texaco wanted those employees to work. Ardoin & Flice dep. p. 58.

Accordingly, the Court finds that Steen exercised no control over plaintiff and placed no restrictions on Texaco with respect to plaintiff's employment conditions. *Capps,* 784 F.2d 618. Therefore, this Court finds that factor five (5) weighs in favor of borrowed employee status.

6. Who furnished the tools and place for performance?

Plaintiff's deposition establishes that "the tools and equipment and platforms all belonged to Texaco." LeMaire dep. p. 73-4. Steen's representative also establishes in his deposition that Texaco provided the tools with which LeMaire worked while doing Texaco work. Solar dep. p. 35. It is undisputed that Texaco provided the sleeping quarters in which LeMaire slept, the meals that he ate, as well as LeMaire's transportation to and from the job site while LeMaire worked for Texaco.

Accordingly, after reviewing the facts of this case, this Court finds that factor six (6) weighs in favor of a finding of borrowed employee status.

7. Was the new employment over a considerable length of time?

The arrangement between LeMaire, Steen and Texaco existed for approximately three months prior to plaintiff's alleged accident. In *Capps,* the Fifth Circuit noted that "[w]here the length of employment is considerable, this factor supports a finding that the employee is a borrowed employee; however, the converse is not true." 784 F.2d at 618. In that case, *Capps'* injury occurred on the first day and the Fifth Circuit concluded that this seventh factor was neutral. *Id.* In *Billizon,* the Fifth Circuit found factor seven to be neutral when the plaintiff had worked for Conoco for more than three months. 993 F.2d 106.

Similarly, because plaintiff only worked under Texaco's supervision for three months in the instant case, this Court finds that factor seven (7) is neutral.

8. Who had the right to discharge plaintiff?

No evidence was provided this Court indicating that Texaco had the right to terminate LeMaire's employment with Steen.

However, in LeMaire's and Solar's depositions, they both testified Texaco had the right to terminate LeMaire's work relationship with Texaco. LeMaire dep. p. 65; Solar dep. p. 35. The Fifth Circuit has stated that "[t]his arrangement is sufficient to support a finding of borrowed servant status." *Brown,* 984 F.2d at 679 (citing *Melancon,* 834 F.2d at 1246; *Capps,* 784 F.2d at 618). Accordingly, this Court finds that factor eight (8) weighs in favor of a finding of borrowed employee status.

9. Who has the obligation to pay the employee?

LeMaire's deposition establishes that Steen paid him, however he only reported his hours to Steen based on the time he spent working for Texaco. LeMaire dep. pgs. 48, 70; Ardoin & Flice dep. 66. In *Billizon, Capps,* and *Melancon,* the Fifth Circuit found that this procedure supported borrowed employee status. Therefore, this Court finds that factor nine (9) weighs in favor of borrowed employee status. *Billizon,* 993 F.2d 105-106; *Melancon,* 834 F.2d 1246; *Capps,* 784 F.2d 618.

Factors 1, 2, 4, 5, 6, 8 and 9 support LeMaire's borrowed-employee status. Although this Court finds factor seven is neutral, the Fifth Circuit, in *Billizon,* has stated "the neutrality of factor [seven] is insufficient to render the district court's summary judgment inappropriate." 993 F.2d at 106. In that case, as stated above, the Court also found that despite the question that existed regarding the third factor, summary judgment was appropriate when the remaining factors clearly pointed to borrowed-employee status. *Id.* This Court finds,

consistent with the *Billizon* Court, that even assuming factor three weighs in favor of LeMaire's position, the remaining factors support, and the evidence provided this Court establishes, that LeMaire was Texaco's borrowed employee.

B. Was Defendant Phillips the Borrowed Employee of Texaco?

1. Who had control over Phillips and the work he was performing, beyond mere suggestion of details or cooperation?

The deposition testimony of Phillips establishes that Texaco employees gave all orders to Phillips. Phillips dep. p. 38-40. Phillips was instructed by Texaco's employees. It is undisputed that the foreman, a Texaco employee, decided where Phillips would work on his seven day shift. Phillips dep. p. 3. Kenneth Dominque, Texaco's lead operator, was Phillips' supervisor. Phillips dep. p. 39.

Like LeMaire, during Phillips' work for Texaco, Phillips filled out a weekly time book of his work hours in order to be paid for the job he was performing for Texaco. Phillips dep. pgs. 43-44. The only contact Phillips had with D&C was to report his hours and receive his paycheck. Accordingly, this Court finds that as to factor one (1), Texaco had control over Phillips and the work he was performing.

2. Whose work was being performed?

Phillips' deposition testimony establishes that Phillips was doing Texaco's work while he was working on Texaco's platform. Phillips dep. p. 41. Accordingly, this Court finds that Phillips was performing Texaco's work.

3. Was there an agreement, understanding, or meeting of the minds between the original and borrowing employer?

Again, as to the contract between D&C and Texaco, plaintiff asserts in his Statement of Material Facts, page 3, that the contract between Texaco and D& C provided that D&C was an independent contractor and that its employees were not subject to Texaco's control. Likewise, this Court adopts the same analysis as was used in reference to LeMaire and the contract between Steen and Texaco.

Despite the contrary provision in the contract between D&C and Texaco, the facts and deposition testimony provided the Court indicate that Texaco controlled the work performed by Phillips. In this case, like *Billizon,* only the third factor could possibly support plaintiff's contention that Phillips was not a borrowed employee of Texaco. However, the Fifth Circuit has repeatedly stated that "no single factor is determinative." *Billizon,* 993 F.2d at 106; *Brown,* 984 F.2d at 676; *Melancon,* 834 F.2d at 1245. Therefore, the Court must further examine the remaining factors to determine Phillips' status on Texaco's borrowed employee.

4. Did the employee acquiesce in the new work situation?

The facts of this case dictate that Phillips acquiesced to the work situation. Phillips worked for one year for Texaco prior to the alleged accident. Phillips continued to work for Texaco for a year and a half after the accident under the conditions previously mentioned which included eating and sleeping in Texaco's field. Accordingly, the Court finds pursuant to factor four (4) that Phillips did acquiesce to his working situation as an employee of D&C and the borrowed employee of Texaco.

5. Did the original employer terminate his relationship with the employer?

As previously stated, during this two and a half years of employment with D&C, Phillips worked under Texaco's supervision and control. Phillips' contact with D&C was limited to reporting his hours so he could receive his paycheck. Phillips dep. pgs. 43-44; Ardoin & Flice dep. p. 66. Accordingly, the Court finds that D&C exercised no control over Phillips and placed no restrictions on Texaco with respect to Phillips' employment conditions. *Capps,* 784 F. 2d 618. Therefore, this Court finds that factor five (5) weighs in favor of borrowed employee status.

6. Who furnished the tools and place for performance?

Phillips' deposition establishes that Texaco furnished the tools he used to perform his work for Texaco. Phillips dep. p. 43. It is undisputed that Texaco provided the sleeping quarters in which Phillips slept, the meals that he ate, as well as Phillips' transportation to and from the job site while Phillips worked for Texaco. Further, all of Phillips' regular duties were handled on the Texaco platforms where he was the lead operator. LeMaire dep. pgs. 66-7. Accordingly, after reviewing the facts of this case, the Court finds that factor six (6) weighs in favor of finding of borrowed employee status.

7. Was the new employment over a considerable length of time?

The arrangement between Phillips, D&C and Texaco existed for approximately a year prior to plaintiff's alleged accident and Phillips continued to work as a Texaco "contract hand" for almost a year and a half thereafter. Phillips dep. pgs. 41-2. Considering the facts and the duration of Phillips' employment with Texaco through D&C, this Court finds that factor seven (7) weighs in favor of a finding of borrowed employee status.

8. Who had the right to discharge Phillips?

In Phillips' deposition, he testified that after almost two and a half years of work for Texaco through D&C, the field foreman, a Texaco employee, called D&C and told them that Texaco no longer needed Phillips. Phillips' deposition establishes that Texaco discharged Phillips from the Texaco work. Phillips was aware that Texaco could discharge him. Phillips dep. p. 42. Accordingly, this Court determines that Texaco, and not D&C, had the right to discharge Phillips from his work for Texaco. Therefore, this Court finds that factor eight (8) weighs in favor of a finding of borrowed employee status.

9. Who had the obligation to pay the employee?

Phillips' deposition establishes that D&C paid him, however he only reported his hours to D&C based on the time he spent working for Texaco. Phillips dep. p. 43. In *Billizon, Capps,* and *Melancon,* the Fifth Circuit found that this procedure supported borrowed employee status. *Billizon,* 993 F.2d 105-106; *Melancon,* 834 F.2d 1246; *Capps,* 784 F.2d 618.

All factors, except factor three, support the borrowed-employee status of Phillips. Once again, this Court relies on the Fifth Circuit's statement in *Billizon* that despite the question that existed regarding the third factor, summary judgment was appropriate when the remaining factors clearly pointed to borrower-employee status. 993 F.2d at 106. Therefore, even assuming factor three weighs in favor of LeMaire's position, the remaining factors support, and the evidence provided this Court establishes, that Phillips was Texaco's borrowed employee.

This Court now has two issues remaining to determine: 1) whether LeMaire and Phillips, each found by this Court, individually, to be borrowed employees of Texaco, were persons "in the same employ" as defined by the LHWCA at the

time of LeMaire's alleged accident, and therefore, immune from tort suit against one another; and 2) if LeMaire and Phillips were co-employees of Texaco, then whether LeMaire's respondeat superior action against Phillips' nominal employer, D&C, is also barred under the LHWCA, 933 (i). The Fifth Circuit addressed both of these issues in *Perron v. Bell Maintenance and Fabricators, Inc.*, 970 F.2d 1409 (5th Cir. 1992). Therefore, this Court will examine LeMaire's actions against D&C and Phillips in light of the Fifth Circuit's findings in *Perron.*

C. *Perron v. Bell Maintenance and Fabricators, Inc.*, 970 F. 2d 1409 (5th Cir. 1992).

The primary issue before the Fifth Circuit in *Perron* was whether the bar under the LHWCA, 933 (i), for suits against a co-employee likewise applied to the respondent superior action before that court filed by the plaintiff against his co-employee's employer. 970 F.2d at 1410. The Fifth Circuit affirmed the district court's granting of summary judgment in favor of the employer. *Id.*

In *Perron,* the Court examined a fact scenario similar to that before this Court. In that case, the plaintiff worked for D&C nominally and was injured while working on a Gulf Oil production platform when he slipped and fell because of oil left on the platform by Michael Lee, a direct employee of Bell Maintenance. The plaintiff filed suit against Gulf Oil ("Gulf") and Bell Maintenance ("Bell"). Gulf was dismissed on summary judgment based on the district court's determination and the Fifth Circuit's affirmation of the plaintiff's status as Gulf's borrowed employee.

Bell Maintenance subsequently filed a motion for summary judgment. The Fifth Circuit affirmed the district court's dismissal of Bell and stated that "[i]n sum, Perron

and Lee were co-workers in every meaningful sense of the term. And because they were borrowed servants/co-employees of the same employer (Gulf), *a fortiori*, they were 'persons in the same employ' under 933(i)." *Id.* At 1412.

In *Perron*, the plaintiff contended that 933(i) immunized only the employer of the injured employee. *Id.* at 1411. The Fifth Circuit corrected this assumption and stated that, "Section 933 (i) does not protect employers; it protects negligent co-employees." *Id.* at 1412. The Court then clarified the borrowed employment issue now before this Court. The Court stated:

> A borrowed servant becomes the employee of the borrowing employer, and "is to be dealt with as the servant of the [borrowing employer] and not of the [nominal employer]." In *Ruiz v. Shell Oil Co.*, our court adopted the borrowed servant rule for the LHWCA. And borrowed servant status is a question of law.

Id. at 1412 (citations omitted). This Court has already determined that both LeMaire and Phillips were the borrowed employees of Texaco. Following the reasoning of the Fifth Circuit in *Perron* and based on the findings of this Court, LeMaire and Phillips were "persons in the same employ" under 933(i). Therefore, this Court finds they were co-employees of Texaco at the time of plaintiff's alleged accident. As LeMaire and Phillips were co-employees it follows, under *Perron*, that Phillips should be dealt with as the servant of Texaco, and not of D&C. *Id.*

After determining the employment status of the plaintiff and Lee in relation to each other and the borrowing employer, Gulf Oil, the Fifth Circuit then explained the next step in the analysis. The Court stated the issue as follows:

> Given that [the plaintiff] is barred by 933(i) from bringing an action against Lee, at issue is whether [the plaintiff] can bring this respondeat superior action against Bell, Lee's nominal employer. Consistent with the LHWCA's comprehensive scheme, [the plaintiff] is barred from doing so.

Id. Adhering to the Court's reasoning in *Perron,* this Court must next address the issue of whether LeMaire can bring a respondeat superior action against D&C, Phillips' nominal employer. The Fifth Circuit has stated that bringing such an action against a co-employee's nominal employer would not be consistent with the LHWCA's comprehensive scheme. *Id.* Thus, the Fifth Circuit states, the plaintiff is barred from bringing this respondeat superior action. *Id.* Accordingly, this Court finds that to allow LeMaire to bring a respondeat superior action against D&C, Phillips' nominal employer, would not be consistent with the LHWCA's comprehensive scheme. Therefore, plaintiff is barred from bringing this respondeat superior action against D&C.

Finally, in *Perron,* the plaintiff contended Louisiana tort law governed his suit against Lee's nominal employer, defendant Bell, under the OCSLA. The Fifth Circuit addressed the plaintiff's OCSLA argument and held that "[s]ection 933(i) provides that LHWCA payments 'shall be the exclusive remedy to an employee when he is injured . . . by the negligence or wrong of any other person or person in the same employ. State law is therefore, preempted by 933(i) in this instance." *Id.* at 1413-14.

In the case *sub judice,* plaintiff contends that the OCSLA requires state law regarding third party negligence, immunity and damages to apply to plaintiff's action against D&C. However, this Court finds that *Perron* dictates otherwise. The Court in *Perron* found Louisiana law regarding third

party negligence and immunity to be inconsistent with 933(i) as it applied to the plaintiff's action against his co-employee's nominal employer. *Id.* Therefore, this Court finds Louisiana law regarding third party negligence and immunity to be preempted here as well.

Defendants assert, and this Court agrees, that the facts before the Court are "on all fours" with *Perron.* Thus, 933(i) applies and precludes the application of any Louisiana tort law principles to plaintiff's action against Phillips and plaintiff's respondeat superior action against Phillip's nominal employer, D&C.

Conclusion

Based on the facts provided this Court regarding the borrowed servant status of LeMaire and Phillips and pursuant to the application of the nine *Ruiz* factors as discussed above, this Court finds that both LeMaire and Phillips were borrowed employees of Texaco, under 933(i) and *Perron,* it necessarily follows that LeMaire and Phillips were "persons in the same employ," and therefore, co-employees.

Considering that both LeMaire and Phillips are co-employees/borrowed servants of Texaco, Phillips and D&C, Phillips' nominal employer, should be dismissed as a matter of law. Under the LHWCA, LeMaire is barred from bringing any action against Phillips as he is LeMaire's co-employee. D&C, as Phillips' nominal employer, is not vicariously liable to LeMaire for the alleged negligence of Phillips. Rather, Phillips is to be dealt with as the servant of Texaco. This Court must apply the LHWCA consistently. Accordingly, the Court finds that 933(i) precludes the application of the inconsistent Louisiana tort law principles under which LeMaire seeks recovery.

Thus, this Court has determined that factors 1, 2, 4, 5, 6, 8 and 9 favor a finding of borrowed employee status as to LeMaire and that all factors, except 3, favor a finding a borrowed employee status as to Phillips. In accordance with the Fifth Circuit's ruling in *Billizon*, this Court finds that despite the uncertainty of the facts relating to factor three, the remaining factors support, and the evidence provided this Court establishes, that LeMaire and Phillips were borrowed employees of Texaco. Under 933(i) and *Perron*, this Court also finds that LeMaire and Phillips were co-employees in the same employ within the meaning of 933(i) of the LHWCA. As a co-employee, LeMaire cannot maintain a tort action against Phillips. As D&C is Phillips' nominal employer and, under *Perron*, is not vicariously liable for Phillips' alleged negligence, LeMaire cannot maintain a tort action against D&C. Accordingly, this Court GRANTS the Motion for Summary Judgment [doc. #37] filed on behalf of defendants, Danos & Curole Marine Contractors, Inc. and Charles Phillips dismissing the complaint of Shawn LeMaire against D&C and Phillips.

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF LOUISIANA

LAFAYETTE/OPELOUSAS DIVISION

SHAWN LEMAIRE, ET AL	CIVIL ACTION NUMBER: 98-0051
VERSUS	JUDGE DOHERTY
DANOS & CUROLE MARINE CONTRACTORS, INC., ET AL	MAGISTRATE METHVIN

ORDER

Considering the foregoing Memorandum Ruling;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Motion for Summary Judgment [doc. #37] filed on behalf of defendants, Danos & Curole Marine Contractors, Inc. and Charles Phillips dismissing plaintiff Shawn LeMaire's complaints against Danos & Curole Marine Contractors, Inc. and Charles Phillips is hereby GRANTED.

Supreme Court, U.S.
FILED
NOV 23 2001
CLERK

No. 01-587

IN THE

Supreme Court of the United States

SHAWN LEMAIRE, *et al.*,

Petitioners,

v.

DANOS & CUROLE MARINE CONTRACTORS, INC., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT DANOS & CUROLE MARINE CONTRACTORS, INC.

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STATEMENT PURSUANT TO RULE 29.6

Respondent, Danos & Curole Marine Contractors, Inc., has no parent corporation and no publicly held company owns 10% or more of its stock.

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Other Authority:

20 C.F.R. §§ 701, *et seq.* 11

REASONS FOR DENYING THE WRIT

The supervisory power of the Supreme Court of the United States should not be invoked because no compelling reasons have been asserted in petitioners' writ application to satisfy the rules of the Supreme Court of the United States. The primary question presented by petitioners is whether the interpretation of the phrase "in the same employ" as contained in 33 U.S.C. § 933(i) qualifies as a substantial 'gap' in federal law, under 43 U.S.C. § 1333, mandating the application of Louisiana law. Petitioners argue that the United States Court of Appeals for the Fifth Circuit improperly held that § 933(i) bars a Longshore and Harbor Workers' Compensation Act claimant from bringing a Louisiana tort action against a "borrowed co-employee" and his nominal employer. According to petitioners, such an interpretation extends federal law "without following applicable Louisiana law to the obvious 'gap' in the federal statutory law" and has created a conflict between the Fifth and the Ninth and Eleventh Circuits. Petitioners also claim that the Fifth Circuit holding conflicts with the Louisiana Supreme Court. Pet. at 5, 12, 14.

The Fifth Circuit opinions in *Perron v. Bell Maintenance and Fabricators, Inc.* 970 F.2d 1409 (5th Cir. 1992), *cert. denied*, 507 U.S. 913, 113 S. Ct. 1264 (1993) and its progeny along with its ruling in the case at bar are consistent with the historical and permissible interpretations of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901, *et seq.* The lower courts simply used historical precedent to interpret the exclusivity provision of § 933(i) of the Longshore Act in determining the identities of persons and entities excluded from tort liability because they are "in the same employ" as the claimant. The Fifth

Circuit interpretation of § 933(i) does not violate the Outer Continental Shelf Lands Act, 43 U.S.C. § 1333, because the interpretation of § 933(i) of the Longshore and Harbor Workers' Compensation Act does not constitute a gap in federal law. No conflict exists between prior opinions of the Fifth Circuit and those of the Ninth and Eleventh Circuits of the U.S. Court of Appeals. The opinions of the Louisiana Supreme Court are not in conflict with the Fifth Circuit on this issue.

I.

THE FIFTH CIRCUIT'S RULING IS CONSISTENT WITH PREVAILING FEDERAL LAW

A. No Gap In Federal Law Exists

Rule 10 of the Rules of the Supreme Court of the United States provides that review on a Writ of Certiorari is not a matter of right, but of judicial discretion and provides three, non-exclusive, reasons to invoke the Court's supervisory power. The first reason is that the United States court of appeals has created a conflict with a decision of another United States court of appeals on an important matter or has decided an important federal question that conflicts with a decision by a state court of last resort; or in some other way has so far departed from the accepted and usual course of judicial proceedings or sanctioned such a departure so as to call for review. The second reason to grant review is where a state court of last resort has decided an important question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals. The third reason occurs when a state court or a United States court of appeals has decided an important question of federal law that

has not been, but should be, settled by this Court, or is in conflict with relevant decisions of this Court. Petitioners have not provided a showing that an important question of federal law is at issue and should be resolved by this Court.

The primary questioned presented by petitioners is whether the Fifth Circuit Court of Appeals violated the Outer Continental Shelf Lands Act (hereinafter referred to as "O.C.S.L.A." or "the Lands Act"), 43 U.S.C. § 1333, by interpreting the phrase "in the same employ", as contained in 33 U.S.C. § 933(i) of the Longshore and Harbor Workers Compensation Act (hereinafter referred to as "the Longshore Act" or "L.H.W.C.A."), 44 Stat. 1424, as amended, 33 U.S.C. §§ 901, *et seq.*, to prevent an injured worker from bringing a claim against another individual and his nominal employer under Louisiana substantive law. Petitioners argue that the Fifth Circuit's opinion impermissibly interprets the phrase "in the same employ" under federal common law because the interpretation must be considered a 'gap' in federal law which must be supplemented with Louisiana law as "surrogate federal law".[1]

The Fifth Circuit's opinions in the case at bar and in *Perron v. Bell Maintenance and Fabricators, Inc.*, 970 F.2d 1409 (5th Cir. 1992), *cert. denied*, 507 U.S. 913, 113 S. Ct. 1264 (1993) are consistent with the historical and permissible interpretations given to federal statutory law under the Lands Act and the L.H.W.C.A. Petitioners argue that O.C.S.L.A., more specifically 43 U.S.C. § 1333(a)(2), provides that Texaco's fixed platform is subject to federal laws and the civil and criminal laws of each adjacent state to the extent that they are applicable and not inconsistent with federal law. To support this petitioners cite *Rodrigue v. Aetna Casualty*

1. Pet. at 6 and 12.

& Surety Co., 395 U.S. 352, 89 S. Ct. 1835 (1969) and *Chevron Oil Co. v. Huson*, 404 U.S. 97, 92 S. Ct. 349 (1971). Petitioners argue that in *Rodrigue*, this Court recognized the existence of substantial gaps in federal law which require the application of an entire body of adjacent state law not inconsistent with applicable federal law.

Petitioners make an erroneous leap arguing for the application of Louisiana law to fill a non-existent 'gap' in federal law, allowing them to pursue a Louisiana tort law claim against a borrowed co-employee, Charles Phillips, and his nominal employer, Danos & Curole Marine Contractors, Inc. In this instance there simply is no gap in federal law. Petitioners specifically acknowledge this on pages 10 and 11 of their Writ Application when they argue that "state law should determine who is 'in the same employ' as contemplated by the Longshore and Harbor Workers' Compensation Act (L.H.W.C.A.) . . ." Nowhere in any of the cited statutes or case law is there any mandate or even a suggestion that federal statutory law should be interpreted by resorting to adjacent state law or jurisprudence, yet this is exactly what petitioners request of this court.

The Lands Act provides that the laws of the adjacent state shall also apply "to the extent that they are applicable and not inconsistent" with applicable federal laws.[2] This court in *Huson* specifically stated that the application of Louisiana law is subject to the **absence** of 'inconsistent' and applicable federal law. The reverse corollary was also pointed out, namely, that to the extent "that a comprehensive body of federal law is applicable under 1333(a)(1), state law 'inconsistent' with that law would be inapplicable under

2. 43 U.S.C. § 1333(a); *Chevron v. Huson*, 404 U.S. 97, 92 S. Ct. at 352.

1333(a)(2)."[3] No precedent exists for interpreting the clear wording of the Longshore Act by using Louisiana statutory or case law. The phrase "in the same employ" of § 933(i) must not be interpreted by looking at any particular state's law. In short, there is no 'gap' in federal law which would require the application of state law principles.

The analyses in *Rodrigue* and *Huson* differ greatly from the arguments of petitioners. Both cases dealt with the application of Louisiana law pursuant to O.C.S.L.A., and did not involve provisions of the L.H.W.C.A. *Rodrigue* dealt with the issue of whether claims based upon the deaths of two workers on an offshore drilling rig, located on the outer continental shelf off the Louisiana coast, fell under the Death on the High Seas Act, 41 Stat. 537, 46 U.S.C. §§ 761, *et seq.* (hereinafter referred to as "the Seas Act") or under Louisiana law through the application of O.C.S.L.A. This Court held that Louisiana law applied through the Lands Act with the distinction being that the accident occurred on an artificial island on the outer continental shelf as opposed to on a vessel as required by the Seas Act. The Seas Act applied to those deaths arising from wrongful acts or omissions "occurring on the high seas" as opposed to artificial islands.[4] This Court carefully considered the wording of the Seas Act along with the legislative history of the Lands Act in interpreting the meaning of both acts. Louisiana law was not considered in this analysis.

In *Huson*, this Court determined that Louisiana's one year limitation on personal injury actions, while applicable to plaintiff's personal injury accident on an artificial island

3. *Chevron Oil Co. v. Huson*, 404 U.S. 97, 92 S. Ct. at 352.

4. 46 U.S.C. § 761.

drilling rig located off the Louisiana coast, did not apply retroactively for three reasons: the application of the Louisiana limitations law, through *Rodrigue*, established a new principle of law effectively overruling a long line of decisions by the Fifth Circuit; retroactive application would not have been consistent with Congressional intent; and such an interpretation would have been inequitable. This Court did not resort to Louisiana's interpretation of the retroactive application of its own limitations laws to determine the outcome in *Huson*, rather, it relied upon historical federal jurisprudence. Petitioners' reliance upon *Rodrigue* and *Huson* is, therefore, mislaid.

The *Rodrigue* case provides a useful example for determining when a substantial 'gap' occurs in federal law under the Lands Act, mandating application of an adjacent state's law. In *Rodrigue*, the Fifth Circuit effectively sought to enlarge the Seas Act by interpreting it to include artificial islands located on the outer continental shelf, thereby creating federal common law. The applicability of the Seas Act itself was at issue. Here, petitioners do not argue that the Longshore Act is not applicable. They argue that the Fifth Circuit should have used Louisiana law to interpret the meaning of the phrase "in the same employ" of § 933(i) of the Longshore Act. In *Rodrigue*, this Court determined that the Seas Act simply did not provide a remedy for an action due to negligent acts or omissions which occurred on an artificial island, therefore a substantial gap existed. Since admittedly § 933(i) of the Longshore Act applies, no gap exists.

B. Historical Analysis And Interpretation

The doctrine of "borrowed servant" prohibits a third-party personal injury claim brought by an injured longshoreman against an entity deemed to be his employer. This concept was first considered by this court in *Standard Oil Company v. Anderson*, 212 U.S. 215, 29 S. Ct. 252, 53 L. Ed. 480 (1909). There, plaintiff, a longshoreman, was struck and injured by a hoisted load unexpectedly lowered into the hold of a ship. The hoist was being operated by a winchman who was found to be in the general employ of the defendant dock owner. This Court took into consideration a number of factors including, for example, which entity had the right to control the borrowed employee's activities in determining that the dock owner was the proper defendant. Subsequently, the Fifth Circuit considered this borrowed servant analysis to determine whether an injured longshoreman was barred from pursuing a tort claim against his borrowing employer under the Longshore Act. *Ruiz v. Shell Oil Company*, 413 F.2d 310 (1969); *see also Evans v. Tiple R Welding & Oilfield Maintenance Corporation*, 472 F.2d 713 (5th Cir. 1973); *Dugas v. Pelican Construction Company, Inc.*, 481 F.2d 773 (5th Cir. 1973). Although the Fifth Circuit determined that *Ruiz* was not a borrowed servant, it later affirmed district court cases where the plaintiff was held to be barred from pursuing personal injury claims based upon this reasoning. *Lorton v. Diamond M Drilling Company*, 540 F.2d 212 (5th Cir. 1976); *See also Gaudet v. Exxon Corp.*, 562 F.2d 351 (5th Cir. 1977); *Hebron v. Union Oil Company of California*, 634 F.2d 245 (5th Cir. 1981).

The development of the application of the borrowed servant defense was not altered by the applicability of the

Lands Act. While the facts indicate clearly that O.C.S.L.A. would have applied in both *Gaudet* and *Hebron*, no discussion of the application of the Lands Act was included. This interpretation of the exclusivity provisions of the Longshore Act necessarily relied upon historical federal jurisprudence. State law was not considered to determine who qualified as a borrowed servant under the Longshore Act. This historical evoiution is inopposite to petitioners' arguments. Under petitioners' reasoning, the Longshore Act concerning the application of the borrowed servant defense would need to be interpreted differently depending upon whether the accident occurred on the outer continental shelf, thereby invoking the Lands Act. Petitioners do not advocate the application of adjacent state law in lieu of the borrowed servant doctrine in L.H.W.C.A. claims falling under the Lands Act, however, this would be the logical result if their arguments were accepted. No legislative intent argument would support this purpose. The application of this doctrine in Lands Act cases supports the notion that the *Perron* reasoning is a permissible interpretation of legislative intent. This reasoning is bolstered when considering that the borrowed servant doctrine is not contained within the Longshore Act, yet it has been applied consistently in the Fifth Circuit and in other circuits.[5]

In *Washington Metropolitan Transit Authority v. Johnson*, 467 U.S. 925, 104 S. Ct. 2827, 81 L. Ed. 2d 768 (1984), the Supreme Court held that a contractor who purchased L.H.W.C.A. coverage for the employees of its subcontractors could be considered the "employer" of those

5. *See Peters v. Hess Oil Virgin Islands Corp*, 903 F.2d 935 (3d Cir. 1990); *Hugg v. Marine Tank Testing Corp.*, 631 F.2d 1140 (4th Cir. 1980); *See also* unpublished opinion *Kirkpatrick v. Shell Oil Co.*, 912 F.2d 469 (9th Cir. 1990).

employees for purposes of the exclusivity provision of § 905(a) of the L.H.W.C.A. despite the fact that the contractor had not been statutorily required to procure compensation coverage. Clearly, the contractor was not a borrowing employer and no borrowed servant doctrine issue was raised. Congress quickly reacted to *Washington Metro* in 1984 by amending § 905(a) to make clear that a "contractor shall be deemed the employer of a subcontractor's employees only if the subcontractor fails to secure the payment of compensation as required by § [904]."[6]

In *West v. Kerr-McKee Corp.*, 765 F.2d 526 (5th Cir. 1985), the Fifth Circuit held that the 1984 post-*Washington Metro* amendments did not preclude use of the borrowed employee doctrine to bar third-party tort recovery under the L.H.W.C.A. While not specifically addressed, the facts indicate that O.C.S.L.A. would have applied.[7] Noting that the language of the amendment under § 905(a) could be interpreted in different ways, upholding or abolishing the borrowed-employee doctrine, the Fifth Circuit concluded that the 1984 amendments did not affect the borrowed employee doctrine as it had been used in preventing third-party tort suits against a borrowing employer shielded by the Longshore Act.

In deciding this, the Court reviewed the amendment's legislative and jurisprudential history holding a general contractor's statutory duty under the L.H.W.C.A. as "[secondary] and guaranty-like".[8] The Court specifically

6. 33 U.S.C. § 905(a).

7. *West v. Kerr McGee Corp.*, 765 F.2d at 528.

8. *Id.* at 529.

pointed out that the Congressional Conference Committee report discussing the amendments characterized the *Washington Metro* case as an "unwanted deviation from 56 years of precedent."[9] The precedent was noted to specifically include the borrowed employee doctrine of *Ruiz v. Shell Oil, supra.* This acknowledges the Court's ability to interpret federal statutory law without regard to corresponding state interpretations of similar state statutory language. The Court acknowledged Congressional recognition that the exclusivity provisions of the L.H.W.C.A. could be expansively interpreted to provide the exclusivity defense to a borrowing employer even though not specifically announced in the literal wording of the Longshore Act. Thus, the fiction of a borrowing employer is permissible under federal statutory interpretation even where O.C.S.L.A. applies. Accordingly, the interpretation of the phrase "in the same employ" of § 933(i) by the Fifth Circuit in the case at bar and *Perron* is clearly permissible based upon Congress' intent as determined through legislative history and federal jurisprudence.

II.

NO CONFLICT EXISTS BETWEEN THE UNITED STATES COURTS OF APPEAL FOR THE FIFTH CIRCUIT AND NINTH AND ELEVENTH CIRCUITS

Rule 10(a) of the Rules of the Supreme Court of the United States allows for review based upon this Court's supervisory power provided that the United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on an important matter. The provisions of Rule 10(a) are not satisfied by petitioners' writ application. Petitioners argue that the Fifth Circuit opinions in the case at

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9. *Id* at 530.

bar and in *Perron*, *supra*, conflict with two other decisions of the United States Courts of Appeal for the Ninth and Eleventh Circuits. In both cases, petitioners erroneously argue that the § 933(i) language "persons in the same employ", is restricted to individuals employed by the same employer. In the Ninth Circuit case, *Calder v. Crall*, 726 F.2d 598 (9th Cir. 1984), *cert. denied*, 469 U.S. 857, 105 S. Ct. 185, 83 L. Ed. 118 (1984), plaintiff, an Army and Air Force Exchange Service cashier, sued a non-commissioned officer on active duty with the Air Force and a civilian carpenter employed on an Air Force base for personal injury damages. The L.H.W.C.A. applied to the parties through 5 U.S.C. § 8171, which governs compensation for work injuries involving a non-appropriated fund instrumentality. The question then became whether the phrase "persons in the same employ" of § 933(i) included armed forces employees other than employees of the Army and Air Force Exchange Service. Plaintiff argued that 20 C.F.R. §§ 701, *et seq.* defined the relationship between employee and employer in narrow, nominal terms which is the same as petitioners argue in the case at bar.

In rejecting this argument, the Ninth Circuit noted that the Code of Federal Regulations itself provided that the definitions were only to be used as "guidance as to the meaning and use of specific terms in [subchapter A] 20 C.F.R. § 701.102".[10] The Court found that the regulations did not control the definition of the phrase "persons in the same employ" as found in § 933(i). Quite the contrary, the Court held that the parties were federal employees in the same employ even though plaintiff was employed by a different nominal employer than defendants. Thus, they were "in the same employ" as interpreted by § 933(i). Accordingly, the holding of the Ninth Circuit in *Calder* is consistent with the Fifth Circuit holdings.

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10. *Calder v. Crall*, 726 F.2d at 600.

Likewise the Eleventh Circuit in *Traywick v. Juhola*, 922 F.2d 786 (11th Cir. 1991) barred plaintiff's claims against her employer for personal injury damages under § 933(i) of the L.H.W.C.A. There, plaintiff worked as an employee of an non-appropriated fund instrumentality while her defendant supervisor was a civilian employed by the Army. Again applying the L.H.W.C.A. under 5 U.S.C. § 8171, the Eleventh Circuit focused on the phrase "in the same employ" under § 933(i). Citing the *Calder* case, the Eleventh Circuit found that plaintiff and defendant were federal employees in the same employ even though employed by different nominal employers. It is important to note that the Eleventh Circuit specifically stated that the liability of the United States for tortuous acts of federal employees is limited to "the same manner and to the same extent as a private individual under like circumstances". Thus, the Eleventh Circuit analogized the situation involving federal co-employees to a situation involving private individuals, strongly suggesting that the same result would be reached either way. The holdings in *Calder* and *Traywick* are both entirely consistent with the Fifth Circuit opinions.

III.

OTHER CONSIDERATIONS

Petitioners argue that land-based concepts of negligence should apply and also that the equities involved favor their position. The analogy to land-based negligence concepts do not conflict with the Fifth Circuit opinions and the equities are not significantly supportive. Petitioners cite *Weiland v. Pyramid Ventures Group*, 511 F. Supp. 1034 (M.D. La. 1981), quoting *Gay v. Ocean Transport & Trading, Ltd.*, 546 F.2d 1233 (5th Cir. 1977) for the proposition that negligence under the Longshore Act is to be determined by "analogy to land-based

law concepts."[11] These cases concern vessel negligence actions authorized by § 905(b) of the Longshore Act. Petitioners argue these cases as support for application of adjacent state law, however, § 905(b) of the Longshore Act eliminated the doctrine of unseaworthiness as a basis of liability against the vessel owner under these circumstances. This necessarily required a showing of negligence on the part of the vessel owner as is required in land-based torts.[12] In *Weiland*, the Court acknowledged that the land-based negligence concepts that were to be examined where those of the Restatement (second) of torts, as opposed to Louisiana law, even though the accident occurred on navigable waters adjacent to the Louisiana coast.[13]

Petitioners also argue strenuously that the "quid pro quo" upon which the exclusivity provisions in the L.H.W.C.A. are based is glaringly absent. It should be pointed out that the quid pro quo policy inherent in compensation principles is absent from the vast majority of borrowed employee doctrine cases. Although the traditional quid pro quo may be missing from the *Perron* rationale, both the nominal employer of the injured worker and the nominal employer of the negligent borrowed co-employee enjoy the same protection under this arrangement. The nominal employer of the injured worker would also be protected if one of its employees negligently injured another's borrowed co-employee.

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11. Pet. at 16.

12. *Stockstill v. Gypsum Transpt*, 607 F.2d 1112 (5th Cir. 1979), *rehg. denied*, 610 F.2d 818, *cert. denied*, 101 S. Ct. 2044, 451 U.S. 969, 68 L. Ed. 2d 347.

13. *Weiland* at 1037.

Petitioners also argue the inequities of the Fifth Circuit holdings by example, claiming that an employee of an independent inspection company would be insulated without the quid pro quo reasoning. Just as inequitable would be the situation where the L.H.W.C.A. claimant was injured by an employee, nominally employed by a different entity, but who the injured worker had worked with in the same capacity for a number of years. Allowing a third-party tort suit against a co-employee in this instance would not only be a fiction, but it could also force companies who employ workers on the outer continental shelf to hire these "borrowed co-employees" directly to avoid third-party tort liability. This may well result in increased competitive hardships for businesses operating in an industry known for wide economic fluctuation.

Even more importantly, petitioners ignore the inherent equity of the borrowed employee doctrine in considering third-party tort liability. A person generally the servant of one master can become a "borrowed servant" of another. *Standard Oil, supra.* If the borrowed servant commits a tort while carrying out the bidding of the borrowing employer, vicarious liability for that tort attaches to the borrower and not to the general employer. *Denton v. Yazoo & Mississippi Valley R. Co.*, 284 U.S. 305, 52 S. Ct. 141, 76 L. Ed. 310 (1932); *see also Tyson v. Litwin Corp.*, 827 F.2d 1255 (3d Cir. 1987); *Trevino v. General Dynamics Corp.*, 865 F.2d 1474 (5th Cir. 1989); and *Krueger v. Mammoth Mountain Ski Area, Inc.*, 873 F.2d 222 (9th Cir. 1989).

Under the borrowed employee doctrine the nominal employer of the negligent employee is not held liable because it relinquished the vast majority of the elements that make up the employment relationship such as control over the employee and over his work, beneficial purposes of the

work being performed and the providing of tools and job site. *See Ruiz. supra.* In the vast majority of cases it would be totally inequitable to allow recovery from the nominal employer when the most important elements of the employer-employee relationship do not exist.

Petitioners further argue that the Fifth Circuit's rationale in *Perron* was "never the intent of Congress", yet this was precisely Congress' intent in allowing the continuation of the borrowed servant doctrine in the 1984 amendments to the L.H.W.C.A.[14]

IV.

FIFTH CIRCUIT OPINIONS ARE NOT IN CONFLICT WITH THE LOUISIANA SUPREME COURT

Petitioners argue that the Fifth Circuit opinions here and in *Perron* conflict with an opinion of the Louisiana Supreme Court citing *Johnson v. Alexander*, 419 So. 2d 451 (La. 1982). *Johnson* involved a Louisiana workers' compensation case where a third-party tort suit against an employee of a subcontractor brought by an employee of the contractor was allowed as not being prohibited by state compensation law. *Johnson* did not deal with L.H.W.C.A. provisions nor the reasoning of *Perron.* The Louisiana Supreme Court has not directly addressed the *Perron* case nor its reasoning. Since the L.H.W.C.A. should not be interpreted by examining state jurisprudence interpreting state workers' compensation laws, petitioners' arguments on this issue are non-sequitur. Louisiana courts of appeal that have addressed the *Perron*

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14. *See* Congressional Committee Report reference in *West v. Kerr McGee*, 765 F.2d at 530.

issue have adopted *Perron*.[15] Accordingly, Louisiana law is consistent with the holding of *Perron* and the interpretation of the phrase "in the same employ" of § 933(i) of the Longshore Act.

CONCLUSION

Petitioners' Writ of Certiorari should be denied because the supervisory jurisdiction of this court is not warranted. The Fifth Circuit Court of Appeals has not refused to apply Louisiana law as mandated by the O.C.S.L.A. Louisiana law should be applied only if a substantial gap in federal statutory law exists. Since petitioners' writ application focuses on interpretation of the phrase "in the same employ" of § 933(i) of the Longshore Act, no gap in federal law exists sufficient to warrant the application of Louisiana law. The Fifth Circuit should not use Louisiana law to interpret the wording of the Longshore Act.

The decision of the Fifth Circuit in the case at bar and in *Perron* and its progeny are not in conflict with any other circuits of the United States Courts of Appeal. The supervisory jurisdiction of this Court is not warranted because no conflict among the circuits exists.

The legislative history of the Longshore Act reveals that the Fifth Circuit's interpretation of § 933(i) is perfectly permissible. Federal jurisprudence interpreting § 904 and § 905 of the Longshore Act and its application to contractors, sub-contractors and borrowing employers shows that a strict,

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15. *Malbreough v. Halliburton Logging Services, Inc.*, 710 So. 2d 1149 (La. App. 1st Cir. 1998); *Foreman v. Danos & Curole Marine Contractors, Inc.*, 722 So. 2d 1 (La. App. 1st Cir. 1998), *writ denied*, 734 So. 2d 637 (La. 1998); *Jones v. Compression Coat Corp.*, 776 So. 2d 505 (La. App. 3d Cir. 2000).

literal reading of the Longshore Act is not required to give life to its provisions. The interpretation complained of does not undermine the foundation and goals of the legislation.

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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No. 01-587 (3)

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2001

SHAWN LEMAIRE, ET AL
PETITIONERS

VERSUS

DANOS & CUROLE MARINE CONTRACTORS, INC.
RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

APPLICANT'S REPLY TO BRIEF IN OPPOSITION

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APPLICANT'S REPLY TO BRIEF IN OPPOSITION

SUMMARY OF THE ARGUMENT

Contrary to the representations made by Danos & Curole Marine Contractors, Inc. in its brief in opposition to the application of applicant, a gap does exist in the L.H.W.C.A., as applied by O.C.S.L.A., in that 33 U.S.C. 933 does not define the terms "employer" or "employee." Since the Act itself does not define these terms, the courts below should have applied Louisiana law to fill this gap under 43 U.S.C.A.

1333(2)(A) which extends the adjacent state law to the subsoil and seabed of the Outer Continental Shelf and any artificial or fixed structures erected thereon. Since the tortfeasors, Danos & Curole Marine Contractors, Inc. and its employee, Phillips, are not employees or officers of the employer of the applicant, Lemaire, they should not be immune from a liability claim by LeMaire.

The courts below clearly ignored these precepts and, in effect, applied federal common law as represented by the decision of the Court of Appeals, Fifth Circuit, in *Perron v. Bell Maintenance and Fabricators, Inc.*, 970 F. 2d 1409. As a result, the real tortfeasors (Danos & Curole and Phillips) become totally immune from any responsibility in tort or Longshoreman's benefits to the applicant. Furthermore, the employer of applicant (Steen Production Services, Inc.) and its insurer cannot in any way recover the sums paid out in Longshoreman's benefits to applicant, adding to the inequity. Accordingly, this Honorable Court should grant writs in this case and reverse the decision of the Court of Appeals, Fifth Circuit, herein.

ARGUMENT

While the Court of Appeals, Fifth Circuit, acknowledged that this Honorable Court's decision in *Rodrigue v. Aetna Casualty & Surety Co.*, 395 U.S. 352, 89 S. Ct. 1835, 1969 clearly establishes that the remedy for personal injury, as for wrongful death, cannot be derived from admiralty law but must be governed by the law of the adjacent State, Louisiana, it eventually based its decision on a body of "federal common law." What the Court of Appeals, Fifth Circuit has done in the instant matter is essentially what this Honorable Court decried in *Rodrigue*. See also: *Chevron Oil Company v. Huson*, 404 U.S. 97, 100-101, 92 S.Ct. 349, 352-353 (1971).

The courts below erroneously failed to follow this Honorable Court's mandate in *Huson*, thereby creating federal common law as an alleged remedy. As this Honorable Court clearly stated in *Huson:*

> " . . . [U]nder the Lands Act, there is not even such limited freedom to create a federal statute of limitations, for Congress specified that a comprehensive body of state law should be adopted by the federal courts in the absence of existing federal law. **Congress specifically rejected national uniformity and specifically provided for the application of state remedies** which demand state, not federal, statutes of limitation. **Thus, Congress made clear provision for filling in the 'gaps' in federal law** . . . *Chevron Oil Company v. Huson,* 404 U.S. 97, 104 and 105, 92 S.Ct. 349, 354 (1971). See also, *Gulf Offshore Co. v. Mobil Oil Corp.,* 453 U.S. 473, 487-88, 101 S.Ct. 2870, 2880 (1981), quoting *Huson,* **" ' . . . it did not intend that federal courts fill in those 'gaps' by creating new federal law.' "** (Emphasis supplied).

However, this is exactly what the lower courts have done in the instant matter.

This Honorable Court went on to state in *Huson* that: "insofar as *Richards* bears on the present case, it supports our holding that federal courts should not create interstitial federal common law when the Congress has directed that a whole body of state law shall apply." *Huson,* at 105, 92 S.Ct., at 354, (quoting *Richards v. United States,* 369 U.S. 1, 82 S.Ct. 585, 7 L.Ed.2d 492 (which held that under the Federal Tort Claims Act a federal court must apply 'the whole law of the State where the act or omission occurred.' *Id.*, at 11, 82 S.Ct., at 592)).

In sum, the clear congressional intent of 43 U.S.C. 1333(a)(1)&(2) and this Honorable Court's decisions in

Huson and *Rodrigue* should govern the instant matter. The Lands Act calls for the application of the Longshore and Harbor Workers' Compensation Act for compensation and state law negligence to fill in any statutory gaps. "It was the intent of Congress, expressed in the Senate Committee Report, in the Conference Report, and on the floor of the Senate, that state laws be 'adopted' or 'enacted' as federal law." See *Huson*, at 353, quoting *Rodrigue*, at 1838.

Pursuant to the Lands Act, state law should determine who is "in the same employ," as contemplated by the Longshore and Harbor Workers' Compensation Act (L.H.W.C.A.), as there is no statutory definition of "same employ" in L.H.W.C.A. and thus there is a gap in the federal statutory law which should be filled by state law, the representations of Danos & Curole notwithstanding. In the instant matter, **if state law were allowed to supplement and fill the gaps of federal law, there would be no inconsistencies in the federal law because state law would be used as surrogate federal law and hence would be adopted as federal law.**

The Court of Appeals, Fifth Circuit, in *Gaudet v. Exxon Corp.*, 506 F. 2d 351, 5th Cir., 1977 specifically noted that "Louisiana negligence law, pursuant to which plaintiffs sought recovery, is incorporated into federal law by this Act." See also: *Aymond v. Texaco,* 554 F.2d 206 (5th Cir. 1977). Danos & Curole erroneously relies herein upon the case of *Perron vs. Bell Maintenance and Fabricators, Inc.*, 970 F.2d 1409 (5th Cir. 1992) in support of its position. As previously pointed out, *Perron* and its progeny were an erroneous extension of federal law into an area already defined by Louisiana state law, and thus this ruling essentially created federal common law which has spawned numerous incestuous proteges. In *Perron*, the court attempted to fill in the gaps of the statu-

tory law set forth in the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 901 et seq. with alleged federal common law, thereby totally ignoring the mandate of 43 U.S.C. Sec's. 1333 (a)(1) and (a)(2), as well as this Honorable Court's rationale set forth in *Rodrigue*, supra, *Huson*, supra, and *Richards*, supra.

Congress rejected the call for uniformity under the Outer Continental Shelf Lands Act (O.C.S.L.A.), 43 U.S.C. 1333, and specifically provided for state law remedies, where not inconsistent with federal laws. (Emphasis supplied). "Thus, Congress made clear provision for filling in the 'gaps' in federal law; it did not intend that federal courts fill in those 'gaps' themselves by creating new federal common law." *Huson*, 92 S.Ct., at 354, referencing *Richards*, 82 S.Ct. 585, 592, (stating, "' . . . [F]ederal courts should not create interstitial federal common law when the Congress has directed that a whole body of state law shall apply.'").

However, contrary to Congressional intent, the U.S. Supreme Court and previous Fifth Circuit decisions, *Perron*, was decided without following applicable Louisiana state law to the obvious "gap" in the federal statutory law. The application of the *Perron* decision in the instant matter clearly leads to absurd results in that it results in the creation of entire categories of **immune** tortfeasors who have not given any quid pro quo in return, violates the clear Congressional mandate that federal courts should not create interstitial federal common law when the Congress has directed that a whole body of state law shall apply (See: *Huson*, at 354.); and it violates public policy and leads to inequitable administration of the applicable tort and compensation laws found in the O.C.S.L.A. and L.H.W.C.A. Even more egregiously, the *Perron* court accomplished all of the above under the

declared banner of "uniformity" and "consistency" **extending** the "Borrowing Employer Rule" to include all subcontractors and their employees as "coemployees" within the meaning of the L.H.W.C.A. *Perron vs. Bell Maintenance and Fabricators, Inc.*, 970 F.2d 1409 (5th Cir. 1992). (Emphasis supplied). **This is precisely the opposite of what Congress mandated when it enacted the Lands Act and made the call for application of state law in order to fill the gaps in federal law.** (Emphasis supplied).

The Courts below justified the application of *Perron* in exactly the same way. However *Perron* is not "federal law," rather it is federal common law jurisprudence which interprets federal statutory law and is therefore patently incorrect and inconsistent with the expressed Congressional intent of O.C.S.L.A. "Federal law," as contemplated by O.C.S.L.A., is federal **statutory law** (*Chevron v. Huson,* 92 S.Ct., at 354; *Richards v. United States*, 82 S.Ct., at 592; *Walter Oil & Gas Corp. v. NS Group, Inc.*, 867 F.Supp. 549 (S.D. Texas 1994), and nowhere in the Longshore and Harbor Workers' Compensation Act does it mandate that different subcontractors' employees should be considered as "in the same employ," and thus "coemployees," immune from liability under the L.H.W.C.A.

The analysis and reasoning of *Perron*, and hence its application in the instant matter, is clearly wrong under applicable federal laws of O.C.S.L.A. and L.H.W.C.A. The decision is a judicial interpretation not envisioned by Congress, nor provided for in either act. The decision is a clear violation of congressional intent because it effectively grants tort immunity to an otherwise third party defendant who is not liable for compensation and, if *Perron* is followed, also immune for third-party tort liability. In addition, it defeats the right of Steen Production Service, Inc. for indem-

nity and reimbursement for compensation benefits from the negligent third party (Danos & Curole) as envisioned by the L.H.W.C.A.

CONCLUSION

The clear result of the lower court decisions herein is that the applicable language of 33 U.S.C. 933(i) *"[p]rovided,* that this provision shall not affect the liability of a person other than an officer or employee of the employer" does not mean what it says. Since the Act itself does not define its own applicable terms, state law should apply to fill in the gap. Doing this, unless Charles Phillips is an officer or employee of Steen Production Service, Inc., which he is not, then Phillips and Plaintiff, LeMaire, are not "in the same employ." See 33 U.S.C. Sec's. 933(i) and 933(a).

The application of *Perron* to the instant matter by the courts below was clearly erroneous. This Honorable Court should reemphasize its holdings in *Rodrigue, Huson* and *Richards* and apply same to the obvious gap in the existing federal statutory structure in O.S.C.L.A. and L.H.W.C.A. as to the definition of the terms "employee," "employer" and "in the same employ," mandating the application of Louisiana law to resolve the issue presented by the instant fact situation. For all the reasons cited in the original brief of plaintiff-applicant and those cited above, this Honorable Court should grant a writ of certiorari herein.

Respectfully submitted:

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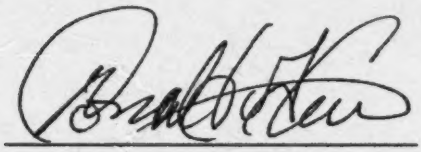

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CERTIFICATE

I hereby certify that copies of the above and foregoing reply brief have this date been forwarded to the below-listed interested parties, or their counsel of record, at the addresses listed herein:

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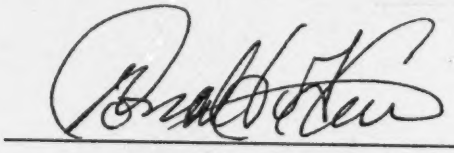

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